Supreme Court, U.S.
FILED
07-761 NOV 13 2007
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No.

IN THE

Supreme Court of the United States

DORN B. HOLLAND, PETITIONER

v.

WASHINGTON HOMES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where an employee proves a *prima facie* case of discriminatory discharge on account of race and the employer proffers *two* conflicting—and irreconcilable---- reasons for the dismissal, should a jury instead of a judge decide whether the employer's proffer is a pretext or coverup for a racially motivated decision?

2. Does the decision below undermine both *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133(2000) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242(1986) by allowing federal judges instead of a jury to decide whether the employer's proffer of two irreconcilable reasons for discharging the petitioner belie a pretext or coverup for a racially motivated decision?

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fourth Circuit in *Dorn B. Holland v. Washington Homes, Incorporated* (C.A. No. 06-1309),decided May 25, 2007, and reported at 487 F.3d 208(4th Cir. 2007), affirming by a majority vote the District Court's order granting summary judgment to the Respondent Washington Homes, Incorporated, is set forth in the Appendix hereto(App. 1-32).

The unpublished Memorandum Opinion of the United States District Court for the District of Maryland, Southern Division, in *Dorn B. Holland v. Washington Homes, Incorporated* (Civil Action No. 8:04-cv-03581-DKC), decided February 14, 2006, granting summary judgment to the Respondent Washington Homes, Incorporated, is set forth in the Appendix hereto(App. 33-66).

The two unpublished orders of the United States Court of Appeals for the Fourth Circuit in *Dorn B. Holland v. Washington Homes, Incorporated* (C.A. No. 06-1309), as corrected and filed on July 19, 2007, denying the petitioner Dorn B. Holland's timely filed petition for rehearing and for rehearing *en banc* is set forth in the Appendix hereto(App. 67-69).

JURISDICTION

The decision of a majority of the United States Court of Appeals for the Fourth Circuit affirming the District Court's order granting summary judgment to the respondent Washington Homes, Incorporated, was entered on May 25, 2007; and its corrected order

denying the petitioner's timely filed petition for rehearing and for rehearing *en banc* was filed on July 19, 2007(App.1;67-69). On or about October 9, 2007, the petitioner applied to Chief Justice Roberts of this Court for an extension of time to file his petition for certiorari until November 16, 2007(Docket No. 07A302). On October 10, 2007, Chief Justice Roberts granted the petitioner's motion, extending the time to file this petition for certiorari until November 16, 2007.

This petition for writ of certiorari is filed within the time limits prescribed by Chief Justice Roberts' order in Docket No. 07A302, allowing the petitioner's application for an extension of time to file this petition until November 16, 2007.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the tight of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §§ 1981(a) and (c):

(a) Statement of equal rights
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(c) Protection against impairment
The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

42 U.S.C. § 2000e-2(a) and (b):

UNLAWFUL EMPLOYMENT PRACTICES
(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Maryland Code Annotated, Labor & Employment, Section 8-1302:

Miscellaneous acts of employers.

An employer, its officer or agent, or another person may not:

(1) knowingly make a false statement or false representation or knowingly fail to disclose a material fact to:

(i) prevent or reduce the payment of a benefit to an individual who is entitled to the benefit;

(ii) avoid becoming or remaining subject to this title; or

(iii) avoid or reduce any contribution or other payment that is required from an employer under this title; or

(2) willfully fail or refuse to:

(i) make a contribution or other payment;

(ii) submit a report that is required under this title;

(iii) produce records that are required under this title; or

(iv) allow those records to be copied and inspected.

Fed. R. Civ. P. 56(c):

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

On October 31, 1998, the respondent Washington Homes, Incorporated ("the respondent" or "Washington") hired the petitioner Dorn B. Holland ("the petitioner" or "Holland"), then a thirty-four-old African-American male, as one of its residential community sales managers ("a CSM") in the Washington, D.C. area(App. 2;33). Holland was one of ten (10) CSMs working for Washington, six (6) of which were white and four (4) of which were African-American. All of them worked under Washington's

supervising sales manager for its southern Maryland sales division, Ms. Dorothy Peck, a white female(App. 3;34).

From October 31, 1998, until February of 2001, Washington assigned Holland to sell residential property in the Maryland subdivision known as Fairfield Commons(App. 3;34). His annual income initially consisted of a base salary of $15,000 together with a one percent (1%) commission on each home sold(App. 2;34). The marketability of the homes within Fairfield Commons development was qualified by its location, its crime rate and the predominance of African-American homeowners(App. 3;34). Washington assigned other CSMs, mainly white, not to Fairfield Commons but rather to more lucrative subdivisions in better areas where the commissions and working conditions were better than Fairfield Commons(App. 3-4;35). Despite this disparate treatment by his employer Washington, Holland sold 89 of the 91 homes in Fairfield Commons and in doing so became Washington's "Rookie of the Year" in 2000(App. 3;34).

In March of 2000, the petitioner met with his supervisor Peck and expressed some dissatisfaction with her decision to transfer a white male CSM, Joseph Macco, to his sales territory thereby allowing Macco to "raid" customers whom he had under contract(App. 3;34-35). In addition, Macco was disseminating false information to Holland's customers to undermine their relationship with him. Peck disputed Holland's claims, told Holland to "pick [his] fights" and allowed Macco to split commissions on Holland's purchasers(App. 3;34). In addition, she denied Holland's request that he be allowed to poach Macco's customers and split

commissions on Macco's customers in the same manner as Macco was allowed to do with his customers(App. 3;34).

When Peck subsequently reassigned Holland to a new subdivision called Winterset in early 2001, she refused him commissions on the two remaining homes in Fairfield Commons he had sold, a privilege which she nonetheless provided Macco when she reassigned him from Penn Place-Suitland to Kingsview Single Family Homes in Charles County(App. 34-35). In fact, white male and female CSMs were regularly provided such privileges and were also assigned better, "premium" locations in Washington's sales area with more incentives and an opportunity to make larger commissions while Holland was regularly denied these opportunities on account of his race, a practice by Washington which deliberately depressed his earnings and diminished his sales status(App. 3-4;35).

From February through June of 2001, the petitioner sold homes in the Winterset subdivision, a development which Washington and Peck knew had substantially less sales potential than those markets regularly assigned white CSMs(App. 3;35). At the start, Washington increased by $40,000 the price of the homes there, a price increase which undercut Washington's own promotional discount campaign and one which Holland believed Washington deliberately employed in order to depress his commissions and force him to quit, all in retaliation for Holland questioning Peck about her disparate treatment of him compared to white CSMs and her refusal to assign him more lucrative sales territories(App. 3;35). As a result of this price increase by Washington, Holland sold no more than three (3)

properties at Winterset(App. 3;35).

From June of 2001 through September of 2003, Peck assigned Holland to various other subdivisions (Arbor West, Kingsview, Robinswood and Hamlin Park), none of which Holland regarded as "premium" assignments in Washington's sales area(App. 3-4; 35-37). Holland claimed that each such assignment was continuing a racially discriminatory practice or pattern, depriving him of a fair chance to sell homes and make a living commensurate not only with his abilities but also comparable to the living made by white CSMs(App. 3-5;35-37). In addition, he claimed that Washington had unfairly denied him the opportunity to participate in a company promotion, its president had made demeaning statements to him in the workplace and Peck had refused to sign him up for a course given by the National Association of Home Builders in 2002(App. 4;36).

In September of 2003, Peck assigned Holland to Hamlin Park, a development Holland believed was not ready to be marketed, while she once again assigned white CSMs to more lucrative subdivisions(App.4;36-37). Holland then brought his claims of racial discrimination to Washington's human resources department(App. 5;37). An investigation ensued and Holland eventually met with Washington's president, Hugo DeCesaris, on September 16, 2003(App.5;37-38). DeCesaris told him that Peck's decision assigning him to Hamlin Park would not be changed because Holland "knew those people" and had "sold that kind of community before"(App. 5;37-38).

In October of 2003, Washington hired a new vice

president for sales in Maryland, Ms. Maura Arndt, a white female(App. 5;38). In anticipation of taking over some of Peck's communities and having been assigned the geographic area which included Hamlin Park, Arndt met with Holland in mid October(App. 5;38). Arndt claimed that during this meeting, Holland vociferously expressed his displeasure with Peck and her workplace assignments(App. 5-6;38). Arndt came away from the meeting with the feeling that Holland might present a physical danger to Peck if he was let go and she informed Washington's human resources personnel that she had concerns about working with him(App. 5). Arndt further informed Peck of Holland's threats and "warned her to be careful"(App. 5;38).

DeCesaris, Peck and Gretchen Leftrict of Washington's human resources department claim they met on the morning of October 30, 2003, to discuss Holland's complaints about the prices of homes in Hamlin Park and DeCesaris decided that Holland must be terminated for threatening Peck(App. 6;38). The same day, Leftrict told Holland that Peck had filed formal charges against him for making violent threats and that he was being terminated immediately for threatening to kill Peck(App. 6;38). Holland denied that he had ever threatened Peck and claimed that he was being discharged in retaliation for asserting his rights to receive fair treatment and equal opportunity in the workplace(App. 6;38).

Although Holland was discharged on October 30, 2003, Washington changed his termination date to November 3, 2003(App. 6;64) . Moreover, it failed to inform the Maryland Department of Labor, Licensing and Regulation that Holland had been discharged for

threatening his supervisor Peck with violence, i.e. "gross misconduct"(App. 6-7;50-51). Rather, Washington told the state agency that Holland had been "laid off" due to lack of work with no possibility of returning(App. 6;50-51). Washington later claimed that giving this false information to the Maryland agency about the circumstances of Holland's dismissal was done so that he would receive unemployment compensation; and it changed the date of his termination from October 30, 2003, to November 3, 2003, so that his retirement benefits would vest(App. 6-7;50-51;64).

On May 4, 2004, Holland timely filed a claim of discrimination with the state's Human Relations Commission and the United States Equal Employment Opportunity Commission(EEOC) (App. 7;39). Shortly after the EEOC issued Holland a right to sue letter on August 26, 2004, he brought a civil action against Washington in the federal district court for the southern division of the District of Maryland(App. 7;39). Positing jurisdiction under 28 U.S.C. §1343(a)(4) and 42 U.S.C. §2000e-5(f), and seeking compensatory and injunctive relief, Holland alleged that he was discharged from his employment on the basis of his race; that he was dismissed in retaliation for complaining of racial discrimination in his workplace; and that during the course of his employment, he was denied opportunities on the basis of his race, all in violation of Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. §2000e *et seq.*(App. 7;39;46). Holland requested a jury trial on all issues which would warrant a jury's consideration under Title VII.

During discovery, Washington moved for summary judgment in its favor as a matter of law under Fed.. R. Civ. P. 56(c), contending that Holland could adduce no direct proof of Washington's discriminatory animus in discharging him and that, in any event, under the framework of proof outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973), Holland could not prove a *prima facie* case either of discriminatory discharge, a retaliatory discharge or a denial of workplace opportunities based on race(App. 43-46).

The district judge first ruled that Holland could establish a *prima facie* case of discriminatory discharge, that Washington had met its burden of presenting a legitimate, nondiscriminatory reason for the discharge, i.e., its belief that Holland had threatened Peck, but that Holland had failed to carry his further burden of proof by showing through a preponderance of evidence that Washington's proffered reason for his dismissal was not its true reason but rather a pretext or coverup for its discriminatory intent(App. 48-51). It therefore granted summary judgment to Washington on Holland's claim of discriminatory discharge(App. 51).

In support of his argument that Washington's excuse for discharging him was a pretext, Holland had cited his flat denials of ever threatening Peck (indeed, it was contrary to common sense and his employment security to do so), an assertion which should have been taken as true on this summary judgment motion(App. 50). In addition, Holland relied on the fact that when Washington reported his unemployment to the Maryland Department of Labor, Licensing and Regulation, it told this Maryland agency that Holland

had been "laid off" due to lack of work, *not* for threatening his supervisor, proof which created a jury question (1) whether Washington was lying now about the true reason(s) for Holland's discharge and (2) whether the allegations of making threats against Peck were "manufactured" by the employer in an attempt to coverup its discriminatory conduct(App. 50). Finally, Holland had contended that no one at Washington ever interviewed him about the threats he allegedly made to Peck(App. 50).

The district judge concluded, however, that none of this proof was enough to create an inference of discriminatory animus sufficient for a jury's determination:

> Even if [the petitioner] did not threaten Ms. Peck, which the court must accept [as true] for the purposes of this motion, [Holland] has come forward with no evidence to show that Mr. DeCesaris did not believe [Holland] had made threats when Mr. DeCesaris decided to fire [Holland]....
> ....[Holland] alleges that [Washington] manufactured the threat allegations to cover up [Washington's] discriminatory conduct, but cites no evidence in the record to support this assertion. [Holland's] final point, that [Washington] fired [him] without interviewing him first about the allegations, does not lead to an inference of discrimination.

(App. 51). Thus because Holland had not adduced sufficient evidence to show that Washington's stated reason for firing Holland was a pretext for

discrimination, summary judgment was granted to Washington on this claim(App. 51). The district court rejected Holland's retaliation claim for the same reason(App. 51-54). Finally, the district judge dismissed Holland's denial-of-opportunity claims because he could not show an adverse employment action concerning his transfer to Hamlin Park and because all the other incidents were barred as untimely(App. 54-60).

Upon the petitioner's appeal, a majority of the Court of Appeals for the Fourth Circuit affirmed the district court in a published opinion on May 25, 2007, reported at 487 F.3d 208(4th Cir. 2007)(App. 1-32). Like the district court, the majority agreed that under *McDonnell Douglas*, Holland had presented a *prima facie* case of racial discrimination and that Washington had responded with a legitimate, nondiscriminatory reason for his dismissal, i.e., DeCesaris believed that Holland had made threats toward Peck(App. 9-10). This showing by Washington shifted the burden of proof back to Holland to show that this asserted reason was a pretext for discrimination or, stated another way, that its proffered explanation "is unworthy of credence"(App. 10-11).

Like the district judge, the majority also concluded that Holland had failed to put forward enough evidence to show that Washington's proffered explanation was false(App. 12). It rejected the idea that a triable fact issue concerning pretext was created by Holland's mere denials that he threatened Peck(which it accepted as true), by Washington's changing the date of his termination to November 3, 2003, or by its reporting to the Maryland agency that Holland was laid off instead of terminated for

cause(App. 12-13). As the majority saw it,

> ...*Washington...claims it took these two steps to be charitable to Holland.* By pushing his termination date a few days forward, Washington...allowed Holland's retirement benefits to vest. Second, by reporting that Holland was laid off [instead of discharged for cause], [it] allowed Holland to seek unemployment benefits from Maryland. Regardless of whether this was "stupid" or "criminal" under Maryland law..., it does nothing to discredit DeCesaris's statement that he fired Holland because he (the decisionmaker) believed that Holland had threatened his supervisor.

(App. 13;16)(emphasis supplied).

Believing Washington's claim about why it lied to the Maryland Department of Labor, Licensing and Regulation concerning the reason for Holland's discharge, the majority found that Washington's actions in this regard showed "charity on the company's part" toward Holland, that there was nothing in the record to show otherwise and that to disbelieve Washington on this score would unfairly punish an employer for trying to help out an employee discharged for cause(App. 14;23). It characterized the contradictory reasons proffered by Washington at different times for Holland's discharge as "a minor discrepancy" and blamed Holland for not presenting evidence sufficient for a trier of fact to find that any other reason besides charity prompted Washington's reliance on two different reasons at different times for Holland's dismissal(App. 14;16).

For the same reasons, the majority affirmed the dismissal of Holland's claim of retaliatory discharge(App. 16-18). It also affirmed the dismissal of Holland's denial-of-opportunity claims because he could not show an adverse employment action concerning his transfer to Hamlin Park and because all the other alleged adverse workplace incidents were barred as untimely(App. 18-22).

Circuit Judge King dissented and would have reversed the entry of summary judgment on Holland's race-based termination and retaliation claims(App. 25-32). As the judge saw it, Holland

> has presented compelling evidence of a material factual dispute, in that Washington...provided the Maryland Department of Labor, Licensing and Regulation...with an entirely different basis for Holland's termination than it has espoused in this case....[That is,] Holland has forecast evidence that even though Washington...informed him that he was being terminated for misconduct, it thereafter reported an entirely different reason for his discharge to the Maryland Agency (which contacted Washington when Holland applied for unemployment benefits) asserting that Holland had in fact been terminated for lack of work.

(App. 25;27). Adverting to decisional law holding that an employer's inconsistent justifications over the course of litigation for an adverse employment action are themselves probative of pretext and present a jury question which survives summary judgment, Judge King concluded that Holland "has presented sufficient

evidence of pretext in this case, showing that Washington has, at different times, given contradictory reasons for his termination"(App. 28-29).

The dissent further chastised the majority for calling Washington's two irreconcilable justifications for firing Holland "a minor discrepancy;" and it considered the majority's willingness to find credible Washington's bald claim that its contradictory responses were justified by notions of "charity" toward Holland to be anathema to summary judgment procedure(App. 29-30). As it wrote, "[i]n adopting Washington['s]...explanation on why it falsely advised the Maryland agency with respect to Holland's termination, the majority is making a credibility determination that is inappropriate in our assessment of a summary judgment award....Put simply, it is for a jury, not an appellate court, to decide whether Washington...was being charitable or, instead, that its conflicting positions constitute evidence of discriminatory misconduct"(App. 29-30). In making this point, the dissent observed in a footnote that it was "immaterial" *why* Washington lied to the Maryland agency; instead, the relevant issue is whether Holland had established pretext by showing that his employer gave two entirely inconsistent explanations for terminating him(App. 31-32).

Noting that there were actually *three* different stories put forth in this litigation about Holland's termination, one by Holland citing racial discrimination, the second based on threats to his supervisor and the third founded on a lack of work, Judge King observed that Washington has admittedly lied about the last one and, under settled principles, therefore did not deserve

to be believed about the second reason(App. 30-31). Moreover, instead of viewing the evidence most favorably to the non-movant Holland, as it should have, *the majority viewed all the conflicting evidence in Washington's favor,* extending itself to find—like a jury—that Washington was actually being charitable to Holland by lying to the Maryland agency and that it is being truthful now(App. 31). As the dissent concluded, "we should not—on summary judgment review---credit the position of *an admitted liar*"(App. 31)(emphasis supplied).

On July 19, 2007, the Court of Appeals in a corrected decision denied the petitioner's timely filed petition for rehearing and for rehearing *en banc*(App. 67-69). On or about October 9, 2007, the petitioner applied to Chief Justice Roberts for an extension of time to file his petition for certiorari until November 16, 2007(Docket No.07A302). On October 10, 2007, Chief Justice Roberts granted the petitioner's motion, extending the time to file this petition for certiorari until November 16, 2007.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals Misapplied the *McDonnell Douglas* Framework of Proof, Wrongly Determining The Fact Issue Of Pretext For Itself Upon Summary Judgment, And Denied The Petitioner A Jury Trial On His Proof That Washington Unlawfully Discriminated When It Discharged Him On October 30, 2003.

McDonnell Douglas "established an allocation of the burden of production and an order for the

presentation of proof in...discriminatory treatment cases" in the absence of direct proof of discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142(2000) quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506(1993). First, the petitioner must establish a *prima facie* case of discrimination. *Id. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253(1981). The term "*prima facie* case" denotes the establishment of a legally mandatory, rebuttable presumption. *Burdine*, 450 U.S. at 254 n.7. The *prima facie* case "raises an inference of discrimination only because we presume [that] these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577(1978)

If the petitioner proves unlawful disparate treatment by a preponderance of the evidence, he has established his *prima facie* case which creates the presumption that the employer has unlawfully discriminated, proof which, if believed by a trier of fact and if the employer is silent in the face of that presumption, would warrant a judgment for the petitioner because no issue of fact remains in the case. *Burdine*, 450 U.S. at 254. Under *McDonnell Douglas*, the employer is then given the opportunity to rebut the petitioner's *prima facie* case by adducing evidence that the adverse employment action was accomplished for a legitimate, nondiscriminatory purpose. *Reeves, supra. Burdine, supra. McDonnell Douglas*, 411 U.S. at 802. It is a burden of production, not persuasion, and involves no credibility assessment. *Id.* quoting *Burdine, supra.*

If the employer successfully carries its burden, the presumption of discrimination---but *not* the

petitioner's evidence in support of this presumption—disappears, the sole remaining issue becomes discrimination *vel non* and the petitioner must prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *Reeves*, 530 U.S. at 143 citing *Hicks*, 509 U.S. at 507-508. That is, aided by the same proof which established his *prima facie* case, the petitioner may establish that he was the victim of intentional discrimination by showing that a discriminatory reason more likely motivated the employer, *Burdine*, 450 U.S. at 256, or that its presumptively valid reasons for disparate treatment "were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. See *Hicks*, 509 U.S. at 510.

Under the *McDonnell Douglas* framework, the petitioner's initial burden of establishing a *prima facie* case of disparate treatment is "not onerous." *Patterson v. McLean Credit Union*, 491 U.S. 164, 186(1989). *Burdine*, 450 U.S. at 253. The typical *prima facie* showing of a discriminatory discharge of an employee will focus on (1) the status of the plaintiff as a member of a protected group; (2) his qualified status or that he was meeting his employer's expectations; (3) an adverse employment action; and (4) following the adverse employment action, his replacement by someone in an unprotected class. *Patterson*, 491 U.S. at 186-187. *Burdine*, 450 U.S. at 253. *McDonnell Douglas*, *supra*.

It was agreed that Holland made a *prima facie* showing here. His summary judgment materials proved that he was a middle-aged African-American who was

discharged from employment when his latest job evaluation was more than satisfactory and that he was subsequently replaced by a similarly qualified white employee(App.10;48). Under the *McDonnell Douglas* framework, Washington replied with proof that Holland was discharged on October 30, 2003, for a legitimate, non-discriminatory purpose, i.e., because he had threatened his supervisor Peck.

The next inquiry *under McDonnell Douglas* is whether Holland proved by a preponderance of the evidence that the reason offered by the employer, i.e., Holland's alleged threat of Peck, was not its true reason for discharge but rather was a pretext for discrimination. On this score, the summary judgment materials showed that immediately after Holland's termination for this purported reason, Washington represented to the Maryland Department of Labor, Licensing and Regulation *another* reason for his discharge, i.e., that Holland had been "laid off" due to lack of work, *not* terminated for threatening his supervisor.

These two inconsistent—and irreconcilable---explanations put forth by Washington during this litigation for terminating Holland do not amount to a "minor discrepancy" which can be harmonized on this motion for summary judgment. Instead, as Judge King's dissent suggests, these two contradictory reasons given by Washington for discharging Holland are so starkly incompatible-- indeed, they permit the inference that *Washington was lying* either to the Maryland agency or to the court---that they create a genuine issue of material fact for a jury whether in giving these two conflicting reasons for terminating

Holland, Washington was mounting a pretext or coverup for its unlawful, discriminatory misconduct. Holland therefore deserved a jury trial under the *McDonnell Douglas'* protocol of proof and the federal courts below were wrong to conclude otherwise.

First, Holland's evidence established a *prima facie* showing that his discharge by Washington was racially discriminatory. Second, in addition to Holland's *prima facie* proof, Washington's contradictory justifications for terminating Holland were themselves a reason to infer that the articulated reason, i.e., threatening his supervisor, was a pretext or a coverup for invidious discrimination. *Reeves*, 530 U.S. at 147-149(a *prima facie* case by the employee together with sufficient evidence to reject the employer's explanation may permit a finding of liability by the factfinder).

The federal courts of appeal uniformly follow *Reeves* and hold that an employer's shifting, incompatible reasons for discharging an employee is itself justification for denying summary judgment to the employer in a workplace discrimination case and permitting the issue of pretext to go to the jury. As the court of appeals for the First Circuit explained,

> [a] company may have several legitimate reasons to dismiss an employee. But when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual [for purposes of the *McDonnell Douglas* framework].

Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432(1st Cir. 2000). *Accord, E.E.O.C. v. Ethan Allen,*

Inc., 44 F.3d 116, 120(2nd Cir. 1994); *E.E.O.C. v. Sears, Roebuck and Co.* 243 F.3d 846, 853(4th Cir.1993); *Thurman v. Yellow Freight Sys.., Inc.*, 90 F.3d 1160, 1167(6th Cir.1996); *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422(7th Cir.1992); *Kobrin v. University of Minnesota*, 34 F.3d 698, 703(8th Cir. 1994); *Washington v. Garrett*, 10 F. 3d 1421,1434(9th Cir. 1993); *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 813(10th Cir. 2000).

Indeed, the *Hicks* Court teaches that the fact issue of discrimination should not be treated differently than any other ultimate question of fact, that whether an employer's "obviously contrived" reason for an employee's discharge adds up to discrimination "remains a question for the factfinder to answer" and that

> [t]he factfinders' disbelief of the reasons put forward by the [employer for discharging the employee] (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the [employer's] proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination....

509 U.S. at 510-511;524(emphasis in original). *Reeves*, 530 U.S. at 147("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling [in order] to cover up a discriminatory purpose...Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative

explanation, especially since the employer is in the best position to put forth the actual reason for its decision.").

Third, Holland adduced other evidence upon summary judgment which further buttresses the inference that Washington's explanations for his discharge were pretextual: the employer changed the time of his termination to later in the day on October 30, 2003, when in fact he was terminated by Gretchen Leftrict earlier in the day without any meeting involving DeCesaris having taken place; the employer did not follow its own guidelines for addressing an employee's threat of violence to one of its supervisors, the asserted reason for his discharge; the police were never contacted nor was Holland ever confronted with the charge of threatening a supervisor with violence; the employer never even interviewed Holland about the alleged threats; the date of his discharge was unilaterally changed by the employer to November 3, 2003; and Holland had been a model employee with a good record until these charges of making threats against his supervisor surfaced on October 30, 2003.

Finally, as *Reeves* makes clear, the court of appeals in reviewing the materials before it was required to draw all inferences in favor of Holland, the nonmoving party, and it could not make any credibility determinations because this is a function of a jury, not a judge. 530 U.S. at 150-151 citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255(1986). Contrary to this law, the court of appeals wrongly believed and then adopted Washington's claim that it was being "charitable" to Holland when, after discharging him for making threats, it then changed its story and told the Maryland Department of Labor, Licensing and

Regulation that Holland was laid off due to lack of work.

Even more damaging, the lower court permitted its unauthorized belief in Washington's story about changing its reasons for discharging Holland to infect its assessment of the petitioner's evidence of discriminatory discharge and retaliatory discharge, nullifying his rights under the *McDonnell Douglas* framework and denying him a jury trial through summary judgment.

While Washington may have adduced evidence from which a jury could reasonably infer that its decision to fire Holland was not based upon discriminatory animus, *Washington produced no evidence which required such a finding.* Instead, Holland put forth ample evidence under the *McDonnell Douglas* framework which permitted a reasonable trier of fact to reject either of Washington's contrived, conflicting reasons for discharging Holland and to find more probably than not that its discharge of Holland was the result of unlawful discriminatory animus. By finding Washington's evidence more credible than Holland's proof, the court of appeals distorted summary judgment procedure, misapplied the *McDonnell Douglas* framework, wrongly determined the fact issue of pretext for itself and denied Holland a jury trial on his claims of workplace discrimination.

2. The Federal Courts Are Abusing Summary Judgment Procedure By Weighing Evidence and Finding Facts In Order to Dispose of Discrimination Claims, Denying Claimants The Jury Trial Guaranteed Them By the Seventh Amendment.

The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is no mere procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed. 1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure now contained in Fed. R. Civ. P. 56 does not violate a party's constitutional right to a jury trial because it is presumed that if the entry of summary judgment is appropriate, *there are no genuine issues of material fact for trial* and therefore no right to a jury trial is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320(1902). See also *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279(1917).

However, both federal jurists and legal commentators have noted that federal trial judges regularly overuse summary judgment in order to take triable cases away from juries. Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78(2006). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). As Professor Miller observes, Rule 56's "paper trials" of crucial, disputed fact issues

> would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross examination....[T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958)("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case."). See also Thomas, Suja A., *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-144;158-160;177-178(2007).

This overuse of summary judgment in Title VII and age discrimination cases in the workplace has been

documented. One scholar concludes that courts in these cases routinely weigh evidence, draw inferences in favor of the moving party (typically the employer-defendant) and make credibility determinations. McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229(1993). Likewise, it was found that courts often reject the plaintiffs' attempts to create inferences of intent and motive through a totality of circumstantial evidence, thereby creating a triable issue, by treating the evidence in a piecemeal fashion, isolating and rejecting as insufficient each of the discrete elements of the plaintiffs' evidence rather than considering their cumulative effect. *Id.* at 233-236.

Such is the case here. Instead of denying Washington's motion for summary judgment because of the conflicting—indeed, irreconcilable—reasons it proffered at two different times for discharging Holland, the court of appeals improperly resolved this crucial fact question of pretext by deciding that one of Washington's lies (to the Maryland state agency) was justified by reason of "charity" to Holland, that Washington was telling the truth when it claimed that it terminated Holland for threatening his supervisor and by then adopting it as a settled fact in this litigation. In the process, it improperly drew every inference from the parties' proof *against Holland*, accepting Washington's contrived explanation for its conduct as true and legally dispositive of the petitioner's claims. The court of appeals as well as the district court thereby usurped the role of the jury by making findings of fact about an event for which *three* different justifications were offered by the evidence.

Holland deserved a jury trial on this crucial fact question and denying him this opportunity is not only unfair but also unconstitutional.

This abuse of Rule 56 procedure justifiably invokes this Court's power of superintendency over the federal courts to reassert their proper role in deciding summary judgment motions in employment discrimination cases, i.e., reaffirming the thrust of *Reeves* and *Anderson* which require them to draw all inferences in favor of the nonmoving party and to refrain absolutely from making any credibility determinations in order to resolve material factual disputes because this is a function of a jury, not a judge.

Finally, to the extent that the decision below requires that in order to prove pretext, the employee must rebut directly each and every legitimate reason proffered by the employer for the adverse employment action, a question which has created a conflict among the circuits, see, e.g., *Sher v. U.S. Department of Veterans Affairs*, 488 F.3d 489, 507-508(1st Cir. 2007); *Crawford v. City of Fairburn, Georgia*, 482 F.3d 1305(11th Cir. 2007); *Tomasso v. The Boeing Co.*, 445 F.3d 702, 707(3rd Cir. 2006); *Zaccagnini v. Chas. Levy Circulating Co.*, 338 F.3d 672, 679-680(7th Cir. 2003); *Martinez v. United States Dept. of Energy*, 170 Fed. Appx. 517, 521(10th Cir. 2006), this Court should resolve the conflict and extinguish any incentive such a rule gives employers to put forth as many reasons as possible for an adverse employment action in the hope that the employee will not be able to rebut each one. See Rosenthal, Lawrence D., *Motions for Summary Judgment When Employers Offer Multiple*

Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule, 2002 Utah Law. Rev. 335, 372-374.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit or provide the petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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(Footnotes trail end of document)

487 F.3d 208;

No. 06-1309

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DORN B. HOLLAND,

Plaintiff-Appellant,

v.

WASHINGTON HOMES, INCORPORATED,

Defendant-Appellee.

March 16, 2007, Argued

May 25, 2007, Decided

COUNSEL: Edward Smith, Jr., SMITH & GARRET, P.A., Baltimore, Maryland, for Appellant.

Steven R. Semler, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Washington, D.C., for Appellee.

JUDGES: Before WILLIAMS, KING, and DUNCAN, Circuit Judges. Judge Williams wrote the opinion, in which Judge Duncan concurred. Judge King wrote a separate opinion concurring in part and dissenting in part.

OPINION BY: WILLIAMS

OPINION

WILLIAMS, Circuit Judge:

Appellant Dorn B. Holland appeals the district court's award of summary judgment to Appellee Washington Homes, Inc. Holland claims that Washington Homes discriminated against him and wrongfully terminated his employment because of his race and his complaints of discrimination. Because Holland has failed to present a genuine issue as to any material fact, we affirm the district court's grant of summary judgment to Washington Homes.

I.

The following facts are presented in the light most favorable to Holland. *See, e.g., Howard v. Winter*, 446 F.3d 559, 562 n.2 (4th Cir. 2006) ("When reviewing a district court's grant of summary judgment, we construe the facts in the light most favorable to the nonmoving party, which in this case was [the appellant].").

Holland is a black male who began working as a sales manager for Washington Homes on October 31, 1998. He sold homes in several subdivisions in the Maryland suburbs of Washington, D.C. for five years before he was terminated on October 30, 2003. Holland's compensation consisted of a base salary plus a commission of one percent for each home he sold. His gross salaries for his years of employment with Washington Homes were: 1998 - $ 4,614.88; 1999 - $

65,444.46; 2000 - $ 74,197.04; 2001 - $ 58,818.80; 2002 - $ 40,430.73; 2003 - $ 131,520.77.

Holland's first assignment was to sell homes at Fairfield Commons, where he worked until the early months of 2001. Fairfield Commons is a predominately African-American community with a substantial crime rate. Holland was able to sell 89 of the 91 homes in Fairfield Commons and was named "rookie of the year" in 2000 due to his performance. At one point in March 2000, Holland met with his supervisor, Didi Peck, a white female vice president, to complain that a white male sales manager, Joseph Macco, was raiding his customers that were under contract. Holland claims that he was forced to share his commissions with Macco, but Macco was not required to share his commissions with Holland. Holland further alleges that Macco was given other perks that Holland was not given during this time period.

In February 2001, Peck assigned Holland to the Winterset subdivision, where he worked until June 2001. Holland alleges that Peck transferred him to Winterset because of his race. He further claims that Washington Homes raised the sales prices of the homes in Winterset by $ 40,000 around the time of his transfer, thereby making it difficult for him to sell the homes. Finally, he alleges that during this time period, Carla Temple, a white female sales manager, was given certain benefits that were denied to him.

In July 2001, Holland was reassigned to the Arbor West subdivision, where he worked for a couple of months. Holland claims that his assignment to Arbor West was discriminatory because Cliff Martin, a white

male sales manager, was allowed to continue selling homes at Arbor West for a week after Martin was reassigned elsewhere.

In September 2001, Peck assigned Holland to the Kingsview subdivision, which he felt was unfair because it required him to increase his transportation expenses. He also claimed that there were only nine homes to sell in Kingsview and that he was denied the opportunity to participate in a company promotion during this period.

In January 2002, Holland was reassigned to the Robinswood subdivision. He claims that this assignment also was discriminatory because Peck had tried to give the assignment to a white sales manager, but that sales manager turned it down. Nevertheless, he admitted that the assignment was "a big money maker and . . . fast money." (J.A. at 228.)[1] Holland says that during this period, Peck refused to sign him up for a National Association of Home Builders class. Moreover, on one occasion in March 2003, Hugo DeCesaris, the president of Washington Homes, asked Holland to make a pot of coffee. Holland claims that this request was discriminatory based on his race.

In September 2003, Peck informed Holland that his next assignment would be Hamlin Park. When Holland told her that Hamlin Park was a blighted community and a bad assignment, Peck assured him that Hamlin Park was ready to be sold and that good money would be made there. When Holland viewed Hamlin Park, it was, in his opinion, not ready to be sold. Around the same time, Peck assigned Macco to the allegedly more desirable community of Winshire Estates.

On September 1, 2003, Holland went to see Edward Kaplan, Washington Homes' human resources vice president. Holland indicated that Peck might be discriminating against him. Kaplan told Holland to express his concerns to human resources manager Gretchen Leftrict. The human resources staff attempted to investigate the matter and resolve the conflict between Peck and Holland.

On September 16, 2003, Holland addressed his concerns over the Hamlin Park assignment to DeCesaris. Holland stated that DeCesaris told him that Holland would have success there because Holland knew "those people" and had "sold that kind of community before." (J.A. at 265.) Holland believed that even though he was enjoying his most successful year at Washington Homes, this new assignment was part of a company design to remove blacks from its workforce.

In late October 2003, Holland discussed his distaste of Peck with Maura Arndt, a new vice president. Thereafter, Arndt expressed concerns that Holland might physically hurt Peck. According to Arndt, Holland said, among other inflammatory things, that Peck "was a crazy bitch" and that he was "gonna show her!" (J.A. at 69.) Although Holland denies these allegations, Arndt claimed that she was so frightened of Holland and what he might do to Peck that she went to Leftrict and stated that she did not want Holland working for her because she was afraid of him. She also went to Peck and warned her to be careful. Upon reporting these allegations to management, Leftrict was instructed to immediately begin an investigation.

During the investigation, Arndt verified her story, and

the allegations against Holland were corroborated by Peck's assistant, Brenda West. Leftrict also learned that Peck had previously sent Holland to anger management class and that Holland had expressed his hatred for Peck to others.

On October 30, 2003, DeCesaris met with Peck and Leftrict to review Holland's complaints about his assignment to Hamlin Park. At this meeting, DeCesaris learned about Holland's physical threats toward Peck and determined that Washington Homes "cannot keep this guy around here if he is making these kinds of threats." (J.A. at 59-60.) After DeCesaris expressed his view that Holland must be terminated immediately, Leftrict explained that she was scheduled to meet with Holland later that day, and she would notify him of his termination at that time. Shortly thereafter, Holland met Leftrict in her office to get a copy of his personnel file. At that time, Leftrict told Holland that Peck had filed a formal charge against him and that he was being terminated immediately. Holland denied threatening Peck and claimed that his termination was retaliation.

Although Holland was fired on October 30, he was told that his end date would be changed to November 3, 2003, so that his 401K plan would reach five-year maturity. Washington Homes thereafter informed the Maryland Department of Labor, Licensing, and Regulation that Holland was dismissed because of lack of work. Thus, the company failed to inform the state agency that Holland was terminated for "gross misconduct." Washington Homes contends this "was done so as to not deprive appellant of unemployment compensation," just as his discharge date was changed

to ensure that Holland's retirement benefits vested. (Appellant's Br. at 26.)

On May 4, 2004, Holland filed a charge of discrimination with the Prince George's County Human Relations Commission and the United States Equal Employment Opportunity Commission (EEOC). On August 26, 2004, the EEOC issued a right to sue letter. On November 8, 2004, Holland filed a complaint against Washington Homes in the District of Maryland pursuant to Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 2003 & Supp. 2006). Holland alleged that he was fired due to his race and as retaliation for complaining of racial discrimination. He also claimed that during the course of his employment, he was denied employment opportunities because of his race.

On February 14, 2006, the district court entered summary judgment in favor of Washington Homes. The district court explained its judgment in a well-reasoned, thirty-three page memorandum opinion. *See Holland v. Wash. Homes, Inc.*, No. 8:04-cv-03581-DKC, 2006 U.S. Dist. LEXIS 96236 (D. Md. Feb. 14, 2006). First, the district court determined that Holland could not show that he was terminated based on his race because Holland presented no evidence that DeCesaris did not believe that Holland had threatened Peck. Because Holland presented no evidence that could show that DeCesaris's legitimate proffered reason for firing Holland was disingenuous, the district court concluded that no issue of fact existed with respect to pretext. The district court also rejected his retaliation claim, finding once again that Holland could not show pretext. Finally, the district court rejected Holland's denial-of-opportunity claims because he could not show an

adverse employment action with respect to his transfer to Hamlin Park, and all other claimed incidents were barred as untimely. Accordingly, the district court granted summary judgment to Washington Homes.

Holland timely appealed. We have jurisdiction pursuant to 28 U.S.C.A. § 1291 (West 2006).

II.

We review de novo the district court's grant of summary judgment in favor of Washington Homes, applying the same standard as did the district court. *See Laber v. Harvey*, 438 F.3d 404, 415 (4th Cir. 2006) (en banc). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). We must construe the facts in the light most favorable to Holland, and we may not make credibility determinations or weigh the evidence. *See Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Edell & Assocs., P.C. v. Law Offices of Peter G. Angelos*, 264 F.3d 424, 435 (4th Cir. 2001). But there must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

Title VII makes it "an unlawful employment practice

for an employer . . . to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C.A. § 2000e-2(a)(1). Holland argues that he was fired because of his race and because he complained of racial discrimination. He further contends that Washington Homes denied him certain workplace opportunities because of his race. We will address each argument in turn.

A.

A plaintiff generally may defeat summary judgment and establish a claim for race discrimination through one of two avenues of proof. First, a plaintiff may establish a claim of race discrimination by demonstrating through direct or circumstantial evidence that his race was a motivating factor in the employer's adverse employment action. *See, e.g., Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004) (en banc). "The second method of averting summary judgment is to proceed under a 'pretext' framework, under which the employee, after establishing a prima facie case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination." *Id.* at 285.

On appeal, Holland confines his argument to the pretext framework. Under the *McDonnell Douglas* pretext framework, an employee demonstrates a prima facie case of race discrimination by showing that (1) he is a member of a protected class; (2) he suffered adverse employment action; (3) he was performing his job duties

at a level that met his employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside the protected class. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

Both parties agree that Holland has made out a prima facie case of discrimination. He is (1) a member of a protected class; (2) he was fired; (3) his job evaluations were satisfactory; and (4) his position was filled by a similarly qualified white candidate.

Because Holland presented a prima facie case, "the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Hill*, 354 F.3d at 285. This burden, however, is a burden of production, not persuasion. Here, Washington Homes met its burden by producing affidavits and testimony demonstrating that Holland was fired because DeCesaris believed that Holland made threats toward Peck. As a result of Washington Homes meeting its burden of production, "the *McDonnell Douglas* framework -- with its presumptions and burdens -- disappear[s], and the sole remaining issue [is] discrimination *vel non*." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (internal quotation marks and citations omitted). "In other words, the burden shifts back to [Holland] to prove by a preponderance of the evidence that the employer's stated reasons 'were not its true reasons, but were a pretext for discrimination.'" *Hill*, 354 F.3d at 285 (quoting *Reeves*, 530 U.S. at 143).

Accordingly, the burden to demonstrate pretext has "merg[ed] with the ultimate burden of persuading the court that [Holland] has been the victim of intentional discrimination." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). In *Reeves*, the Supreme Court clarified how a claimant can avoid summary judgment under the *McDonnell Douglas* framework. Once the question comes down to pretext, a plaintiff "must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves*, 530 U.S. at 143 (internal quotation marks omitted). A plaintiff could accomplish this goal "by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256.

In *Reeves*, the company claimed that Reeves was fired because he had failed at his responsibility of recording worker attendance. Reeves, however, offered evidence that he properly maintained the attendance records. This evidence, the Supreme Court explained, combined with the strong evidence supporting Reeves's prima facie case, was enough to support a jury's verdict of liability. *Reeves*, 530 U.S. at 146. Thus, the Supreme Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148 (emphasis added). But the Supreme Court cautioned that this will not always be the case; for example, judgment as a matter of law may be appropriate if a "plaintiff created only a weak issue of fact as to whether the employer's reasons were

untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* Thus, a key factor for courts to consider is "the probative value of the proof that the employer's explanation is false." *Id.* at 149.

Unfortunately for Holland, he has not put forth sufficient evidence showing that Washington Homes' proffered legitimate explanation was false. Aside from his denials as to the threats (which we accept as true), nothing in the record supports an inference that DeCesaris's explanation was pretextual, or perhaps more on point, that DeCesaris did not believe that Holland had threatened Peck when he made the decision to fire him.[2]

Holland makes a number of arguments against this conclusion, but they are unavailing. First, Holland contends that he was fired at 9:30 a.m. on October 30, 2004, which is flatly inconsistent with Washington Homes' statements that the decision to fire Holland was made during a meeting on the morning of October 30, and Holland was not informed of the decision until that afternoon. Holland contends that Washington Homes "fudged" affidavits to conceal the fact that the rationale to fire Holland was contrived after the real decision was made.

This is a serious charge that, if true, would go far beyond showing pretext on Washington Homes' part. The trouble for Holland, however, is that there is *no evidence* in the record that supports the contention that his meeting with Leftrict occurred at 9:30 a.m. or was scheduled at 9:30 a.m. There exists not even a scintilla of evidence that Holland's meeting with Leftrict

occurred before the termination decision was made by DeCesaris. After being pressed at oral argument about the lack of evidence, Holland eventually conceded as much and abandoned the claim.[3] Accordingly, Holland's first contention is without merit.

Holland further alleges, and our good colleague in dissent agrees, that an inference of pretext can be made because Washington Homes changed the date of his termination to November 3 and reported to a Maryland state agency that Holland was laid off, as opposed to terminated for cause. But Washington Homes cla ns it took these two steps to be charitable to Holland. By pushing his termination date a few days forward, Washington Homes allowed Holland's retirement benefits to vest. Second, by reporting that Holland was laid off, Washington Homes allowed Holland to seek unemployment benefits from Maryland. Regardless of whether this was "stupid" and "criminal" under Maryland law (Reply Br. at 1), it does nothing to discredit DeCesaris's statement that he fired Holland because he (the decisionmaker) believed that Holland had threatened his supervisor. Moreover, nothing in the dissent even addresses how this could create an issue of fact over DeCesaris's belief.

"Once an employer has provided a non-discriminatory explanation for its decision, the plaintiff cannot seek to expose that rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to it. The former would not create a 'genuine' dispute, the latter would fail to be 'material.'" *Hux v. City of Newport News*, 451 F.3d 311, 315 (4th Cir. 2006) (internal citation omitted).

Washington Homes has put forth evidence that its decisionmaker decided to fire Holland because he believed that Holland threatened his supervisor.[4] That Washington Homes, as part of its employment reporting responsibilities, thereafter reported a different reason and date of termination to a state employment agency does not cast doubt on the decisionmaker's proffered reason or create a genuine and material issue of fact. Rather, it shows later charity on the company's part,[5] and there is nothing in the record to suggest otherwise. In fact, Holland has put forth no evidence that contradicts Washington Homes' assertion that it inaccurately reported his termination date and reason solely to benefit Holland. Moreover, Holland does not argue that the inaccurate reporting somehow benefitted Washington Homes, or that the company had some hidden motive.

It is difficult, then, to take seriously the dissent's point on this matter. Where is the unresolved "conflict of material fact?" *Post* at 21. The only reason we have adopted "Washington Homes' explanation on why it falsely advised the Maryland Agency with respect to Holland's termination," *post* at 21, is because Holland has offered no contrary explanation. It takes two sides to create a conflict. Again, Holland has put forth no evidence that any other reason besides charity contributed to the report. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" (quoting Fed. R. Civ. P. 56(e))). Thus, although a reasonable trier of fact would conclude that Washington Homes reported a different reason and

date,[6] when combined with the company's innocuous reasoning for these decisions and Holland's failure to present any other evidence -- beyond baseless speculation -- that DeCesaris's stated reason was pretextual, that trier of fact "would be hard-pressed to conclude that this established pretext." *Price v. Thompson*, 380 F.3d 209, 216 (4th Cir. 2005) (affirming district court's award of summary judgment to company in Title VII case where evidence of pretext was equivocal at best).

This conclusion fits nicely within our precedent.[7] In *Tinsley v. First Union Nat'l Bank*, for example, we affirmed the district court's grant of summary judgment to the Bank in a Title VII case because the plaintiff "offer[ed] no evidence that the events recounted in [the decisionmaker's] affidavit are untrue or that retaliation was the true reason for [the] firing." 155 F.3d 435, 444 (4th Cir. 1998). We explained that the "uncontested evidence establishe[d] that [the decisionmaker] honestly believed that Tinsley deserved to be discharged." *Id.*

Here, the uncontested evidence established that DeCesaris (the decisionmaker) honestly believed that Holland deserved to be discharged for threatening Peck, regardless of whether Holland did in fact issue the threats. Thus, Holland's evidence failed to address whether DeCesaris did not honestly believe that the threats were made, and ultimately, "[i]t is the perception of the decisionmaker which is relevant." *Id.*; *see, e.g., Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228, 246 (1st Cir. 2006) ("In assessing pretext, a court's focus must be on the perception of the decisionmaker, that is,

whether the employer believed its stated reason to be credible." (internal quotation marks omitted)).

Accordingly, we agree with the district court's treatment of the issue:

Even if [Holland] did not threaten Ms. Peck, which the court must accept for purposes of this motion, Plaintiff has come forward with no evidence to show that Mr. DeCesaris did not believe [Holland] had made threats when Mr. Decesaris decided to fire [him].(J.A. at 419.) In short, on the evidence in the record, no reasonable juror could conclude that Washington Homes' "proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Beyond that, Holland has failed to put forth sufficient evidence showing that discrimination was the real reason behind Washington Homes' decision. Accordingly, we affirm the district court's judgment with respect to Holland's discriminatory discharge claim.

B.

Holland further contends that he was fired for complaining about race discrimination. To state a prima facie case of retaliation, Holland must show (1) that he engaged in a protected activity; (2) Washington Homes acted adversely against him; and (3) the protected activity was causally connected to the adverse action. *See, e.g., Beall v. Abbott Labs.*, 130 F.3d 614, 619 (4th Cir. 1997).

It is undisputed that Holland engaged in a protected activity by complaining about disparate treatment and that Washington Homes acted adversely against him by

terminating his employment. The parties, however, dispute whether the third element is satisfied.

To prove a causal connection, Holland must be able to show that Washington Homes fired him "*because* the plaintiff engaged in a protected activity." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998). The first thing Holland must be able to prove, therefore, is DeCesaris's knowledge that he engaged in a protected activity. Although the evidence is unclear on this point, we assume that DeCesaris knew of Holland's previous complaints and that Holland has made out a prima facie case.

Because we assume a prima facie case exists, the burden shifts to Washington Homes "to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for its actions." *Beall*, 130 F.3d at 619. Washington Homes has offered DeCesaris's belief in Holland's threats as the real reason for the discharge. Accordingly, the burden shifts back to Holland to show that the reason is "mere pretext for retaliation by proving both that the reason was false, and that discrimination was the real reason for the challenged conduct." *Id.* (internal quotation marks omitted).

Holland cannot show that the decision was mere pretext for the same reasons that he could not make that showing with respect to his discriminatory discharge claim. He presented no evidence that DeCesaris fired him to retaliate as opposed to DeCesaris's belief that Holland threatened Peck. In this context, it is once again "the perception of the decisionmaker which is relevant not the self-assessment of the plaintiff." *Id.* (internal quotation marks omitted).

Accordingly, we affirm the district court's grant of summary judgment to Washington Homes on Holland's retaliatory discharge claim.

C.

Holland's remaining claims are best described as claims that he was treated disparately because of his race. Most significantly, he contends that white sales managers similarly situated to him received better opportunities with respect to commissions, advancement, incentives, and training. Washington Homes contends that the majority of Holland's claims are time barred and that his remaining claim fails to state a Title VII violation. We agree.

Title VII establishes two potential limitations periods within which a discrimination charge may be filed with the EEOC. *See* 42 U.S.C.A. § 2000e-5(e)(1). "The basic limitations period is 180 days after the alleged unlawful employment practice. However, the limitations period is extended to 300 days when state law proscribes the alleged employment practice and the charge has initially been filed with a state deferral agency." *Tinsley*, 155 F.3d at 439. Holland qualifies for the 300 days' limit.

Holland contends that he was discriminated against when Washington Homes assigned him to Hamlin Park. That reassignment occurred within the 300 days' period.

To prevail on a Title VII claim, "the existence of some adverse employment action is required." *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir.

2004). An adverse employment action is a discriminatory act that "adversely affect[s] the terms, conditions, or benefits of the plaintiff's employment." *Id.* (internal quotation marks omitted). "The mere fact that a new job assignment is less appealing to the employee, however, does not constitute adverse employment action." *Id.* at 376. There must be some significant detrimental effect and "absent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position." *Boone v. Goldin*, 178 F.3d 253, 256-57 (4th Cir. 1999).

Holland claims that selling homes in Hamlin Park would have been more difficult because the area was blighted, and thus, presumably, his compensation would have decreased. Beyond Holland's bald assertion, however, he has put forth no evidence demonstrating that his compensation would have been adversely affected by the reassignment. He did not identify where the neighborhood is located, the type of home being sold, the crime rate, or information about the home values in the surrounding area. In short, he has provided no evidence to support his assertion that he would have been adversely affected by the move. "[S]peculation about the future adverse consequences of a reassignment may not rise to the level of a genuine dispute [because] we are left to guesswork and conjecture as to what [Holland's] prospects would have been." *James*, 368 F.3d at 377. Accordingly, Holland cannot show that he suffered an adverse effect because of his reassignment to Hamlin Park.

Holland further contends that even if the Hamlin Park assignment was not discriminatory in violation of Title VII, Washington Homes committed other discrete discriminatory acts. Although he concedes that these other acts occurred outside of the 300 days' parameter, Holland argues we should nevertheless consider them under the "continuing violation" theory.

The continuing violation theory allows for consideration of incidents that occurred outside the time bar when those incidents are part of a single, ongoing pattern of discrimination, i.e., when the incidents make up part of a hostile work environment claim. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 118, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) ("Given . . . that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment.").

Holland, however, cannot benefit from the continuing violations theory because he has alleged discrete violations. Although Holland claims that he was denied benefits by Washington Homes that were given to whites because of "his race and the application of [the company's] institutionalized policy," we, along with other courts, "have declined to extend the limitations periods for discrete acts of discrimination merely because the plaintiff asserts that such discrete acts occurred as part of a policy of discrimination." *Williams v. Giant Food, Inc.*, 370 F.3d 423, 429 (4th Cir. 2004); *see also Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th

Cir. 2003) ("[I]f the mere existence of a policy is sufficient to constitute a continuing violation, it is difficult to conceive of a circumstance in which a plaintiff's claim of an unlawful employment policy could be untimely." (internal quotation marks omitted and citation omitted)).

Holland "can only file a charge to cover discrete acts that 'occurred' within the appropriate time period." *Morgan*, 536 U.S. at 114. Simply put, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113. Aside from the Hamlin Park assignment and Holland's termination, all other alleged acts occurred outside the 300 days' period. That Holland claims that these time-barred acts against him were related to Washington Homes' overarching policy of discrimination is of no consequence. We therefore hold that because the Hamlin Park reassignment does not constitute a violation of Title VII, and that is his only claim within the 300 days' time period, summary judgment was proper on Holland's remaining claims.

III.

Washington Homes has put forth uncontested evidence that it terminated Holland because its decisionmaker believed that Holland was making physical threats toward his supervisor. Whether Holland actually made these threats is irrelevant in this context because it is uncontested that the decisionmaker believed that he did. Title VII endeavors to eliminate workplace discrimination, but the statute was not designed to strip employers of discretion when making legitimate, necessary personnel decisions, such as the decision to

terminate an employee when an investigation determines that employee made physical threats against a supervisor. Because Holland failed to put forth sufficient evidence that the decisionmaker had some other illegitimate motive in firing him, we must affirm the district court's award of summary judgment to Washington Homes.

AFFIRMED

Footnotes

[1]Citations to the "J.A." refer to the joint appendix filed with this appeal.

[2]For example, Holland claims that DeCasaris could not have believed that Holland threatened Peck "for countless reasons of common sense." (Reply Br. at 1.) Such bald assertions are unhelpful and do nothing to present a triable issue of fact.

[3]Prior to oral argument, Washington Homes filed a Local Rule 28(j) letter alerting the Court to the Fifth Circuit's recent decision in *Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255 (5th Cir. 2007), where the court affirmed the district court's imposition of sanctions against plaintiff's counsel for misquoting the record. *Id.* at 266. That case, however, is irrelevant as no sanctions were imposed by the district court in this case. Washington Homes also attempts to call our attention to Local Rule 46(g)(1), which addresses this court's power to discipline attorney misconduct. We are aware of our sanctioning powers and choose not to invoke them in this instance.

[4]This case does not present the question of whether an employer may be liable under Title VII when an employee is dismissed as the result of the discriminatory actions of a coworker who was not the ultimate decisionmaker, but nevertheless exercised some substantial level of influence over the ultimate decisionmaker. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc) (declining to hold that "a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision become[s] a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision"). Rather, Holland argues that the actual decisionmaker (and the company as a whole) had a discriminatory motive.

[5]If the company had followed Holland's and the dissent's proposed route, Holland would have not only lost a job, but his 401K plan would have failed to reach maturity by a few days, and he would have been denied state unemployment benefits. Of course, the message to employers is clear: Do no favors for those you terminate for cause, for the risk is a Title VII discrimination suit and a dissent in the Federal Reporters labeling you "an admitted liar." Post at 23. The old adage, no good deed goes unpunished, has never rung so true.

6It is important to note that these clerical decisions were not made by DeCesaris, the decisionmaker who decided to fire Holland.

Oddly, the dissent seems unconcerned with the change in Holland's termination date. Perhaps the dissent

agrees that action could only have been charitable. Why it presents a different situation than the report to the state agency, however, is anyone's guess.

[7]The precedents cited by our good dissenting colleague, however, are inapposite. In *E.E.O.C. v. Sears Roebuck & Co.*, for example, Sears continually changed its story during the course of discovery. 243 F.3d 846, 849-50 (4th Cir. 2001). Likewise, in *Alvarado v. Board of Trustees*, Alvarado "was told he was terminated because there was a lack of work at the College." 928 F.2d 118, 122 (4th Cir. 1991). The College thereafter claimed that Alvarado was fired for "unsatisfactory job performance." *Id.* at 123. *Sears* and *Alvarado* stand for the proposition that when a company changes its story after it cannot support its initial story, there is an obvious issue of pretext. Here, on the other hand, Washington Homes never changed its story. It did not give Holland one justification and the courts another. Washington Homes' explanation has been consistent from the moment it informed Holland he was being terminated -- he was being fired because he threatened to kill his supervisor, the same explanation Washington Homes gave the courts. Nevertheless, to show charity to Holland in an aspect completely unrelated to the course of this litigation, the company told a state agency he was laid off. According to our precedents, this is not the stuff of which pretext is made.

CONCUR BY: KING (In Part)

DISSENT BY: KING (In Part)

DISSENT

KING, Circuit Judge, concurring in part and dissenting in part:

This appeal is controlled by a simple principle: Where the defendant employer in a race-based termination and retaliation action has tendered multiple, contradictory explanations for its termination of the plaintiff -- and has admitted that one of those explanations was a lie -- a jury must decide whether the employer's court-proffered explanation for the termination is pretextual. That straightforward precept is compelled both by our precedent and by fundamental principles of evidence, and should be entirely uncontroversial. Yet the majority rejects it, instead holding that such a mendacious defendant can be found credible *as a matter of law.*

Accordingly, although I concur in the portion of the majority's opinion ruling that Dorn Holland's claims of pre-termination disparate treatment are time barred (Part II.C), I respectfully dissent from the majority's affirmance of summary judgment on Holland's race-based termination and retaliation claims (Part II.A and .B). To the contrary, Holland has presented sufficient evidence to demonstrate that Washington Homes' asserted nondiscriminatory reason for terminating Holland was pretextual. More specifically, Holland has presented compelling evidence of a material factual dispute, in that Washington Homes provided the Maryland Department of Labor, Licensing, and Regulation (the "Maryland Agency") with an entirely different basis for Holland's termination than that it has espoused in this case. As explained below, Washington Homes' false statement in this regard

warrants a trial on Holland's race-based termination and retaliation claims.

As spelled out in the majority's opinion, Holland has pursued his discriminatory termination and retaliation claims against Washington Homes under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this standard, once a plaintiff has established a prima facie case of unlawful discrimination or retaliation, "the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (en banc). Here, as properly recognized by the majority, Holland has established prima facie race-based termination and retaliation claims, and Washington Homes has responded with its asserted nondiscriminatory reason for the termination. Specifically, Washington Homes contends in this proceeding that Holland was terminated because its President believed Holland had made threatening statements against his supervisor. Because Washington Homes articulated a nondiscriminatory reason for firing Holland, "the burden shifts back to [Holland] to prove by a preponderance of the evidence that [Washington Homes'] stated reasons 'were not its true reasons, but were a pretext for discrimination.'" *Hill*, 354 F.3d at 285 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)). Holland is entitled to establish such a pretext "by showing that the employer's proffered explanation is unworthy of credence." *Reeves*, 530 U.S. at 143 (internal quotation marks omitted). My disagreement with the majority centers on the evidence of pretext.

On appeal, Holland contends that the evidence creates a genuine issue of material fact on whether Washington Homes' proffered explanation for his termination was false. Holland has forecast evidence that, even though Washington Homes informed him that he was being terminated for misconduct, it thereafter reported an entirely different reason for his discharge to the Maryland Agency (which contacted Washington Homes when Holland applied for unemployment benefits), asserting that Holland had in fact been terminated for lack of work.

The majority acknowledges that Washington Homes reported a conflicting reason for Holland's termination to the Maryland Agency, but concludes that this evidence does not discredit Washington Homes' contention that it terminated Holland for threatening his supervisor. The majority sees this conflict as simply a minor discrepancy, concluding that Holland has failed to demonstrate that Washington Homes' court-proffered explanation is pretextual. In so ruling, the majority relies on *Hux v. City of Newport News*, 451 F.3d 311, 315 (4th Cir. 2006), which recognized that a "plaintiff cannot seek to expose [an employer's] rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity." In *Hux*, a decision in which I joined, the plaintiff had sought to rebut the employer's proffered reason of inferior job qualifications by comparing "herself to other employees on the basis of a single evaluative factor artificially severed from the employer's focus on multiple factors in combination." 451 F.3d at 315.

The *Hux* case, however, is materially different from the situation here. Holland is not seeking to demonstrate pretext by focusing on a single factor severed from a combination of other factors. Instead, he shows pretext by focusing on the fact that Washington Homes has provided two contradictory explanations for his termination, a proposition supported by our precedent in *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846 (4th Cir. 2001), and *Alvarado v. Board of Trustees*, 928 F.2d 118 (4th Cir. 1991).

In the *Sears* case, the plaintiff had presented evidence that Sears had, over the course of the litigation, provided a variety of legitimate, nondiscriminatory explanations for its failure to hire him. 243 F.3d at 852-53. In evaluating whether this evidence was sufficient to demonstrate pretext, we concluded that it was, and the fact that Sears offered multiple, inconsistent justifications for its adverse employment action was, "in and of itself, probative of pretext." *Id.* at 853. In *Alvarado*, we ruled that the plaintiff had presented sufficient evidence of pretext by showing that his employer first asserted he was being fired for lack of work, and then later alleged that he was fired for unsatisfactory job performance. 928 F.2d at 122-23; *see also Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."); *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 647 (4th Cir. 2002) ("The fact that an employer has offered inconsistent post-hoc explanations for its employment decisions is probative of pretext . . . ."); *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000) ("[W]hen a company, at different

times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual."); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext."); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (concluding that reasonable juror could infer that employer's inconsistent explanations were evidence of pretext). Based on the relevant precedent, Holland has presented sufficient evidence of pretext in this case, showing that Washington Homes has, at different times, given contradictory reasons for his termination.

In order to counter Holland's evidence that Washington Homes has made two conflicting -- and irreconcilable -- explanations for his termination, the majority concludes that its reporting of a different termination reason to the Maryland Agency fails, as a matter of law, to cast doubt on its position in this case. In so doing, the majority relies on Washington Homes' explanation that, in making its false statement to the Maryland Agency, it was simply acting out of charity. The majority is incorrect in this regard, however, because it is thereby impermissibly resolving a conflict of material fact. In adopting Washington Homes' explanation on why it falsely advised the Maryland Agency with respect to Holland's termination, the majority is making a credibility determination that is inappropriate in our assessment of a summary judgment award. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ."). Put simply, it is

for a jury, not an appellate court, to decide whether Washington Homes was being charitable or, instead, that its conflicting positions constitute evidence of discriminatory misconduct. *See id.*[1]

The majority apparently fails to recognize that there were, under this evidence, three different stories presented concerning Holland's termination. First, Holland contends that he was terminated because of his race and his previous complaints of discrimination. Washington Homes, by contrast, maintains in this proceeding that Holland was terminated because he threatened his supervisor. The third story is the one Washington Homes asserted to the Maryland Agency: that Holland was terminated for lack of work. Because Washington Homes admittedly lied to the Maryland Agency, a jury, under settled evidentiary principles, including the maxim of *falsus in uno, falsus in omnibus* ("false in one thing, false in all"), would be entitled to disregard all of its evidence concerning Holland's termination. *See Black's Law Dictionary* 491 (7th ed. 1999) (describing maxim as "[t]he principle that if the jury believes that a witness's testimony on a material issue is intentionally deceitful, the jury may disregard all of that witness's testimony"); *see also* Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 15.06 (5th ed. 2000) (spelling out time-honored jury instruction that "[i]f a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters"); Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 73.04 (4th ed. 1987) (spelling out similar jury instruction that "[i]f a witness is shown knowingly to have testified falsely concerning

any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves").[2]

Finally, the majority has failed to view the evidence in the proper light, that is, in the light most favorable to Holland, as the non-moving party. *See Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004) (recognizing that courts must view "the facts and inferences drawn therefrom in the light most favorable to the non-moving party" in reviewing summary judgment award). Instead, the majority has viewed the conflicting evidence in the light most favorable to the defendant, concluding that Washington Homes was being charitable to Holland in providing false information to the Maryland Agency and that it is being truthful now.[3] On the contrary, we should -- for summary judgment purposes -- conclude that Washington Homes terminated Holland because of race and his previous complaints of discrimination, and that it is not being truthful when it asserts that Holland was terminated for threatening his supervisor. Put simply, we should not -- on summary judgment review credit the position of an admitted liar.

I would reverse the award of summary judgment to Washington Homes on Holland's race-based termination and retaliation claims. I therefore respectfully dissent.

Footnotes

[1]It is immaterial that Washington Homes, in connection with its admitted false statement to the Maryland

Agency, changed Holland's termination date so that his 401(k) plan would mature. That circumstance does not at all explain Washington Homes' admission that it lied at least once concerning its reason for terminating Holland. In fact, the relevant issue is not why Washington Homes lied, but whether Holland has established pretext by demonstrating that Washington Homes gave two entirely inconsistent explanations for Holland's termination. *See Sears*, 243 F.3d at 853; *Alvarado*, 928 F.2d at 122-23.

[2]Holland has no obligation -- under the *McDonnell Douglas* burden shifting standard -- to further counter Washington Homes' evidence that it lied only to the Maryland Agency (proof that Washington Homes gave two inconsistent explanations is sufficient).

[3]Under Maryland law, Washington Homes could, on the basis of its present position, be subject to prosecution for a misdemeanor, because "an employer, its officer or agent, or another person" may not "knowingly make a false statement or fact representation or knowingly fail to disclose a material fact" to "avoid becoming or remaining subject" to Maryland's labor and employment laws. Md. Code Ann., Lab. & Empl. § 8-1302 (West 2007).

Civil Action No. DKC 2004-3581

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DORN B. HOLLAND v. WASHINGTON HOMES, INC.

February 14, 2006, Filed

COUNSEL: For Dorn B. Holland, Plaintiff: Edward Smith, Jr, LEAD ATTORNEY, Law Office of Edward Smith Jr, Baltimore, MD.

For Washington Homes, Inc., Defendant: Steven Robert Semler, Ogletree Deakins Nash Smoak and Stewart PC, Washington, DC.

JUDGES: DEBORAH K. CHASANOW, United States District Judge.

OPINION BY: DEBORAH K. CHASANOW

OPINION

MEMORANDUM OPINION

Presently pending and ready for resolution in this Title VII discrimination case are: (1) Defendant's motion for summary judgment (paper 14); (2) Plaintiff's motion for an extension of time to complete discovery (paper 16); (3) Plaintiff's motion for leave to file an amended complaint (paper 23); and (4) Defendant's

motions to strike (papers 29, 30, and 34). The issues are fully briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, the court will grant Defendant's motion for summary judgment, deny Plaintiff's motion to extend the discovery deadline, deny Plaintiff's motion for leave to file an amended complaint, and deny two of Defendant's motions to strike as moot, but grant the third.

I. Background

The following facts are undisputed except where noted, and are presented in the light most favorable to Plaintiff. Plaintiff Dorn B. Holland is an African-American male who worked as a community sales manager for Defendant Washington Homes, Inc., from October 31, 1998, until he was terminated on or about October 30, 2003. Plaintiff's income consisted of a base salary plus a commission of one percent for each sale.

Plaintiff's first assignment was to sell homes at Fairfield Commons; he worked there through January or February of 2001. Fairfield Commons is a predominately African-American community with a stigma for crime. He sold 89 of 91 homes and was chosen as Rookie of the Year in 2000 due to his success.

In March 2000, Plaintiff met with his supervisor, Didi Peck, a Caucasian company vice president, to complain about a Caucasian community sales manager, Joseph Macco, "raiding" his customers who were under contract. Around that time, Plaintiff was forced to split his commissions with Mr. Macco, but was denied the same opportunity when he requested a commission split on Mr. Macco's sales. In January or February of 2001,

he was told he could not put a lock box on two Fairfield Commons units, which would allow him to earn commissions when the units were sold, but learned that Mr. Macco was allowed to use lock boxes.

Plaintiff was next assigned to Winterset, where he worked from February 2001 to June 2001. In his deposition, Plaintiff testified that Ms. Peck transferred him to Winterset because of his race. Moreover, about the time of his transfer, Defendant raised Winterset's home sales prices by $ 40,000. Plaintiff stated that Ms. Peck placed him at Winterset knowing it would be difficult to sell the homes with the $ 40,000 increase. He also stated that the builder was offering a discount promotional program that initially was not made available to him. Plaintiff further contends that Ms. Peck gave Carla Temple, the Caucasian community sales manager who replaced him at Winterset, incentives that he did not receive.

> She gave me a set amount of homes to sell and only specific home sites. She increased the sales price $ 40,000 on day one, but she offered Ms. Temple 25, at least $ 2,500 more in closing monies. She allowed Ms. Temple to take offers on homes, as she had not allowed me. And she allowed Ms. Temple to sell the homes at random, from all of the home sites that were available.

(Paper 14, ex. 1, Holland dep., 86).

Plaintiff's next assignment was Arbor West, where he worked from July 2001 to September 2001. He testified that the Arbor West assignment was discriminatory because a Caucasian sales manager, Cliff

Martin, who had been transferred from Arbor West to Perrywood, was allowed to continue selling at Arbor West for a week after the assignment. Plaintiff said he asked to go to Perrywood, a more lucrative community, while Mr. Martin continued to sell homes at Arbor West, but was denied the opportunity. [1]

In September 2001, Plaintiff was assigned to Kingsview, which he felt was not a favorable assignment because it required more out-of-pocket expenses in terms of transportation, was not as lucrative, and had only nine homes left to sell. In November 2001, Plaintiff sought to participate in a sales incentive in which employees could win a free trip if they sold enough homes. Plaintiff said he was denied the trip even though he sold eight homes, two more than the minimum number Ms. Peck told him he needed to sell.

In January 2002, Plaintiff learned his next assignment would be Robinswood. He maintains this assignment was discriminatory because Ms. Peck had tried several times to give the Robinswood assignment to a Caucasian sales manager, Ruby James, who turned down the assignment. In April 2002, Ms. Peck refused to sign Plaintiff up for a class offered by the National Association of Home Builders; Plaintiff asked another vice president to sign him up. [2] Plaintiff also testified to an incident in March 2003 in which Hugo DeCesaris, the president of Washington Homes, walked into the lunch room and asked him to make a pot of coffee in front of his co-workers.

In early September 2003, Ms. Peck told Plaintiff his next assignment would be Hamlin Park. Plaintiff

expressed concern that Hamlin Park was a blighted community. Ms. Peck assured him Hamlin Park was ready to be sold, it was "quick money," and his next community would be Forestville. When Plaintiff went to view Hamlin Park, the community was not ready or open. Around the same time, Ms. Peck assigned Mr. Macco to Winshire Estates, which Plaintiff believed was a more attractive assignment. Plaintiff believed Ms. Peck had used "subterfuge" to give Mr. Macco Winshire Estates and to give him Hamlin Park.

On September 1, 2003, Plaintiff met with Edward Kaplan, human resources vice president, to discuss his problems with Ms. Peck. Plaintiff questioned whether he was experiencing racial discrimination. On September 3, 2003, Plaintiff met with Human Resources Manager Gretchen Leftrict to discuss his concerns about racial discrimination. On September 8, 2003, Plaintiff, Ms. Peck, and Ms. Leftrict held a meeting, which ended with Ms. Leftrict telling Plaintiff and Ms. Peck to go to Hamlin Park together so Ms. Peck could show Plaintiff why the community was ready to sell and would be lucrative.

On September 16, 2003, Plaintiff met with Mr. DeCesaris. Plaintiff expressed concern that Hamlin Park was blighted and overpriced and that his salary was "being depressed." Plaintiff testified that Mr. DeCesaris gave this response:

> [W]ell, go - look, I mean, you know those people. You sold that kind of community before. And I said I know those people, what do you mean by I know those people? Like I said, you've sold that type of community before, you had Fairfield, you

> did well there. And I said, are you saying that the Winshire Estate opportunity was never available to me? He said, well, look, we put Joe where we put Joe, because we envision him being there. We put you where we put you, because that's what we had for you.

(Paper 14, ex. 1, Holland dep., 169).

On October 30, 2003, Plaintiff met with Ms. Leftrict to look at his personnel file and to make copies. During the meeting, Ms. Leftrict told Plaintiff that Ms. Peck had filed a formal charge against him alleging that he had made violent threats against her, and therefore he was being terminated immediately. Plaintiff denied threatening Ms. Peck and said this was retaliation. [3]

With respect to Plaintiff's termination, Defendant contends that Plaintiff was fired because he made threatening remarks about Ms. Peck. [4] Ms. Leftrict began an investigation on October 24, 2003, after Maura Arndt, another vice president, expressed concerns about Ms. Peck's safety. During the investigation, Ms. Leftrict obtained sworn statements from Ms. Arndt and Brenda West, Ms. Peck's administrative assistant, in which they stated that Plaintiff had made threatening statements about Ms. Peck. [5] Mr. DeCesaris stated in an affidavit that he decided to fire Plaintiff during an October 30, 2003, meeting after learning of the threat allegation and hearing about Ms. Leftrict's investigation.

Plaintiff filed a charge of discrimination with the Prince George's County Human Relations Commission and the United States Equal Employment Opportunity Commission ("EEOC"). On August 26, 2004, the EEOC issued a right-to-sue letter. Plaintiff filed a lawsuit against Washington Homes, Inc./K. Hovnanian Company on November 8, 2004, pursuant to Title VII of the Civil Rights Act of 1964 and 1991, *42 U.S.C. § 2000e et seq.* [6]

II. Motion to Extend the Discovery Deadline and Motion For Leave to File an Amended Complaint

On May 6, 2005, Plaintiff filed a motion to extend the discovery deadline until July 6, 2005. (Paper 16). Defendant opposed the motion, arguing that the request is out of time based on the Scheduling Order. (Paper 18). Similarly, on May 13, 2005, Plaintiff filed a motion for leave to amend his original complaint, asserting lack of knowledge of certain facts when he filed his complaint. (Paper 23). Defendant opposed this motion as well on the basis that the motion is time barred. (Paper 25).

A. Motion to Extend the Discovery Deadline

The Scheduling Order set April 20, 2005, as the deadline for discovery. (Paper 9). Plaintiff requested an extension stating that "[a]s of the writing of this Motion counsel for the Plaintiff has not received the Scheduling Order, electronically or via mail." (Paper 16, at 2). He further stated that an extension would not prejudice Defendant. *Id.*

Plaintiff's request implicates *Federal Rule of Civil Procedure 16(b)*, which states "[a] schedule shall not be

modified except upon a showing of good cause and by leave of the district judge . . . ." *Rule 16(b)*'s "good cause" standard focuses on the timeliness of the amendment and the reasons for its tardy submission. Because a court's Scheduling Order "'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril,'" *Potomac Elec. Power Co. v. Elec. Motor Supply, Inc., 190 F.R.D. 372, 375-76 (D.Md. 1999)* (quoting *Gestetner v. Case Equip. Co., 108 F.R.D. 138, 141 (D.Me. 1985))*, a movant must demonstrate that the reasons for the tardiness of this motion justify a departure from the rules set by the court in its Scheduling Order.

The primary consideration for the *Rule 16(b)*'s "good cause" standard is the movant's diligence. Lack of diligence and carelessness are "hallmarks of failure to meet the good cause standard." *W. Va. Hous. Dev. Fund v. Ocwen Tech. Xchange, Inc., 200 F.R.D. 564, 567 (S.D.W.Va. 2001)*. "[T]he focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end." *Marcum v. Zimmer, 163 F.R.D. 250, 254 (S.D.W.Va. 1995)*.

Plaintiff contended that he did not receive the Scheduling Order. Rule V.A of the Electronic Filing Requirements and Procedures manual states that "[e]lectronic filing by the court or court personnel of any orders, decrees, judgments or proceedings of the court shall constitute entry on the docket as well as notice to and service on registered users in the case, under the Federal Rules of Civil Procedure." Electronic Filing Requirements and Procedures (Aug. 11, 2003), *available at* www.mdd.uscourts.gov. By registering to use electronic filing, Plaintiff's counsel consented to

receiving electronic service. *See id.* at II.A.3. Plaintiff's assertion - some six months after he filed his complaint - that he did not receive the Scheduling Order despite the fact that it was docketed December 6, 2004, shows a lack of diligence, and consequently a lack of good cause. Accordingly, the court will deny Plaintiff's motion to extend the discovery deadline.

B. Motion to Amend the Pleading Deadline

The Scheduling Order set January 20, 2005, as the deadline for amendment of pleadings. (Paper 9). Plaintiff's motion for leave to amend his complaint triggers both *Federal Rule of Civil Procedure 15(a)*, governing amendments to pleadings, and *Rule 16(b)*. [7] The standards for satisfying the rules are at odds. *Rule 15(a)* states in pertinent part that "leave shall be freely given when justice so requires," while *Rule 16(b)* states that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge . . . ."

Neither the Fourth Circuit nor the Supreme Court have dealt decisively with the interplay of these two rules when the plaintiff seeks a motion to amend its complaint after the Scheduling Order's deadline has passed. However, one district court in the Fourth Circuit set up a two-step analysis:

> Once the scheduling order's deadline for amendment of the pleadings has passed, a moving party first must satisfy the good cause standards of *Rule 16(b)*. If the moving party satisfies *Rule 16(b)*, the movant then must pass the tests for amendment under *15(a)*.

Marcum v. Zimmer, 163 F.R.D. 250, 254 (S.D.W.Va. 1995); see also Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992) (applying two-step analysis to deny motion to amend for lack of good cause).

As discussed previously, *Rule 16(b)*'s "good cause" standard focuses on the timeliness of the amendment and the diligence of the moving party. Plaintiff has not specifically requested a modification of the Scheduling Order. Instead, Plaintiff has filed a motion to amend his complaint in which he asserts: "At the time plaintiffs [sic] complaint was filed, plaintiff Holland was ignorant of certain relevant facts that are important to enable plaintiff Holland to maintain plaintiff's complaint. Because the facts came into possession after the filing of the complaint, plaintiff Holland was unable to allege them in plaintiff's original complaint." (Paper 23, at P 2). Plaintiff also asserts that "the new facts contained in plaintiff's amended complaint are necessary to enable plaintiff to prove plaintiff's cause, and therefore the amendment sought is in furtherance of justice." *Id.* at P 4.

Plaintiff's motion does not establish good cause. Plaintiff has not stated *what* new information has surfaced, *when* the information surfaced, or *why* the information was not available to Plaintiff sooner. Plaintiff also fails to address why he filed the motion more than three months after the Scheduling Order deadline passed and after Defendant filed its motion for summary judgment. Accordingly, Plaintiff's motion for leave to amend will be denied. *See Rassoull v. Maximus, Inc., 209 F.R.D. 372, 374 (D.Md. 2002)* (denying the plaintiff's motion for leave to amend her complaint when the plaintiff failed to provide reasons

for her tardiness and stating "it would behoove Plaintiff to provide the Court with some basis on which to judge good cause"); *see also Odyssey Travel Center, Inc. v. Ro Cruises, Inc., 262 F.Supp.2d 618, 632 (D.Md. 2003).*

III. Standard of Review For the Motion for Summary Judgment

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson, 477 U.S. at 250; see also Pulliam Inv. Co. v. Cameo Props., 810 F.2d 1282, 1286 (4th Cir. 1987); Morrison v. Nissan Motor Co., 601 F.2d 139, 141 (4th Cir. 1987).* The moving party bears the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See Fed.R.Civ.P. 56(c); Catawba Indian Tribe of S.C. v. South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1415, 122 L. Ed. 2d 785 (1993).*

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *See United States v. Diebold, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); Gill v. Rollins Protective*

Servs. Co., 773 F.2d 592, 595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp., 477 U.S. at 323.* Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. *See Anderson, 477 U.S. at 256; Celotex Corp., 477 U.S. at 324.* However, "[a] mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment." *Detrick v. Panalpina, Inc., 108 F.3d 529, 536 (4th Cir.), cert. denied, 522 U.S. 810, 118 S. Ct. 52, 139 L. Ed. 2d 17 (1997).* There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson, 477 U.S. at 249-50* (citations omitted).

IV. Analysis

There are two methods for proving intentional discrimination in employment: (1) through direct or indirect evidence of intentional discrimination, or (2) through circumstantial evidence under the three-step, burden-shifting scheme set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).* For the first method, an employee may utilize "ordinary principles of proof using any direct or indirect evidence relevant to and sufficiently probative of the issue."

Rhoads v. F.D.I.C., 257 F.3d 373, 391 (4th Cir. 2001) (internal quotation omitted), *cert. denied, 535 U.S. 933, 122 S. Ct. 1309, 152 L. Ed. 2d 219 (2002)*. In order to overcome a summary judgment motion based upon this method of proof, the plaintiff "must produce direct evidence of a stated purpose to discriminate and/or [indirect] evidence of sufficient probative force to reflect a genuine issue of material fact." *Id.* (internal quotation omitted). More specifically, the plaintiff must provide "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Id. at 391-92* (internal quotation omitted). If such evidence is lacking, the plaintiff nevertheless may proceed under *McDonnell Douglas. See Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649 (4th Cir. 2002)*.

Under the *McDonnell Douglas* framework, the plaintiff first must establish a *prima facie* case of discrimination. *See McDonnell Douglas Corp., 411 U.S. at 802*. Once a plaintiff establishes a *prima facie* case of discrimination, the burden of production shifts to the defendant to present a legitimate, nondiscriminatory reason for the adverse employment action alleged. *See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* (citing *Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981))*. If the defendant succeeds in doing so, that will rebut the presumption of discrimination raised by the plaintiff's *prima facie* case. *See Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 429 (4th Cir. 2000)* (citing *Burdine, 450 U.S. at 255 n.10*). The plaintiff then must "prove by a preponderance of the evidence that the

legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine, 450 U.S. at 253.* In the end, "[t]he plaintiff always bears the ultimate burden of proving that the employer intentionally discriminated against her." *Evans v. Tech. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996)* (citing *Burdine, 450 U.S. at 253*).

Plaintiff's complaint alleges two types of race-based discrimination: (1) discriminatory discharge with respect to his termination and (2) discrimination with respect to denial of opportunities.

A. Plaintiff's Termination

Plaintiff argues he was fired to due to his race (paper 24, at 5) and in retaliation for complaining to Defendant's managers about his sales assignments (paper 24, at 9).

1. Plaintiff's Firing Due to His Race

Plaintiff asserts he has direct evidence of discriminatory intent regarding his termination. (Paper 24, at 3). The evidence includes Mr. DeCesaris' statement to Plaintiff that "you know those people. You sold that kind of community before;" the incident in which Mr. DeCesaris asked Plaintiff to make coffee in front of other employees; the fact that Mr. DeCesaris supported Ms. Peck and had a condescending manner during their meeting; Ms. Peck's decision to assign Plaintiff to minority areas to sell homes; Ms. Peck's decision to assign more lucrative communities to Caucasian community sales managers; unequal treatment with respect to the raiding of customers, splitting commissions, using lock boxes, and offering

certain incentives and sales prices; and an income discrepancy between Plaintiff and Mr. Martin.

None of Plaintiff's evidence bears directly on Plaintiff's termination. First, Plaintiff points to Mr. DeCesaris' comment that Plaintiff "knows those people." However, this single remark is unrelated to Mr. DeCesaris' decision to fire Plaintiff. *See Brinkley v. Harbour Recreation Club, 180 F.3d 598, 608 (4th Cir. 1999)* ("[T]o prove discriminatory animus, the derogatory remark cannot be stray or isolated and '[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of [discrimination].'" (quoting *McCarthy v. Kemper Life Ins. Cos., 924 F.2d 683, 686 (7th Cir. 1991))).* Second, many of the incidents Plaintiff relies on (e.g., the raid of Plaintiff's customers, the commission splits, the use of lock boxes, incidents at Winterset) occurred more than two years before Plaintiff's termination and Plaintiff has presented no evidence connecting these incidents to Defendant's decision to fire him. *See Brinkley, 180 F.3d at 608-09.*

There are two ways to analyze Plaintiff's claim of discriminatory discharge based on race and/or retaliation. First, if Plaintiff was treated more harshly than others outside his protected class for comparable misconduct, the disciplinary termination could be discriminatory. Second, the termination could be discriminatory if Defendant's purported reason (that Plaintiff allegedly made threats) was mere pretext for intentional discrimination based on race or retaliation. Based on the evidence Plaintiff has provided, Plaintiff has proffered insufficient facts to support either theory.

a. Discriminatory Discipline

To establish a *prima facie* case of discriminatory discipline under *McDonald Douglas*, the plaintiff must show "(1) he is a member of a protected class; (2) he was qualified for his job and his performance was satisfactory; (3) he was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances." *Bryant v. Bell Atlantic Md., 288 F.3d 124, 133 (4th Cir. 2002)*. Plaintiff has presented no evidence whatsoever regarding the discipline of other employees who engaged in conduct similar to the threats he allegedly made, and therefore he cannot establish a *prima facie* case of discriminatory discipline.

b. Discriminatory Discharge

To establish a *prima facie* case of intentional discrimination based on race under *McDonnell Douglas*, the plaintiff must show: (1) he is a member of a protected class; (2) he suffered from an adverse employment action; (3) when the employer took the adverse employment action, the plaintiff was performing at a level that met his employer's legitimate expectations; and (4) the position remained open or was filled by a similarly qualified applicant outside the protected class. *See Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 285 (4th Cir. 2004)*; *King v. Rumsfeld, 328 F.3d 145, 149 (4th Cir. 2003)*.

Plaintiff can establish a *prima facie* case. First, Plaintiff, an African-American male, is a member of a protected class. Second, Plaintiff suffered an adverse employment action when he was fired. Third, Plaintiff presented his last evaluation, dated September 25, 2003, a month before his firing, in which he received satisfactory marks. (Paper 24, ex. 7). Fourth, Plaintiff

was replaced by a Caucasian male, Mr. Martin. (Paper 14, ex. 4, P 9).

Defendant has presented a legitimate, nondiscriminatory reason for firing Plaintiff. Defendant asserts that the termination decision was based on Defendant's belief that Plaintiff had threatened Ms. Peck. (Paper 14, exs. 4-8). Defendant has met its burden of production, and therefore the "presumption of discrimination 'drops out of the picture.'" *Reeves, 530 U.S. at 143* (quoting *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-08, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)).* Plaintiff must then prove by a preponderance of the evidence that Defendant's proffered reason is not its true reason, but instead a pretext for discrimination. *Burdine, 450 U.S. at 253.*

In *Reeves,* the Supreme Court clarified the plaintiff's burden at this stage. *Reeves, 530 U.S. at 146-47.* The court stated:

> The factfinder's rejection of the [defendant's] legitimate nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. [*Hicks,*] *509 U.S., at 511 113 S.Ct. 2742.* The ultimate question is whether the [defendant] intentionally discriminated, and proof that "the [defendant's] proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that plaintiff's proffered reason . . . is correct." *Id. at 524, 113 S.Ct. 2742.* In other words, "[i]t is not enough . . . to *disbelieve* the [defendant]; the factfinder must *believe* the plaintiff's

> explanation of intentional discrimination." *Id. at 519, 113 S.Ct. 2742.*

Reeves, 530 U.S. at 146-47 (emphasis in original). The Court noted that in some cases it may be *permissible* to infer discrimination from the falsity of the defendant's reason. *Id. at 147.* In those cases, if a plaintiff produces evidence sufficient to establish a *prima facie* case and that the defendant's legitimate nondiscriminatory reason is false, the plaintiff may not be required to present additional evidence of discrimination in order to withstand summary judgment. *See id.* The court nevertheless emphasized that this sort of showing by a plaintiff *may not always* be adequate. The court stated: "Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id. at 148.*

Plaintiff argues that Defendant's reason is pretextual because Plaintiff denied threatening Ms. Peck. In addition, when Defendant reported Plaintiff's unemployment to state officials, Defendant cited "lack of work" as the reason. (Paper 24, ex. 6). Plaintiff asserts that the threat allegations were "manufactured by defendant" to cover up Defendant's discriminatory conduct. (Paper 24, at 8). Finally, Plaintiff points out that Defendant never interviewed Plaintiff about the alleged threats.

Even if Plaintiff did not threaten Ms. Peck, which the court must accept for purposes of this motion, Plaintiff has come forward with no evidence to show that Mr. DeCesaris did not believe Plaintiff had made threats when Mr. DeCesaris decided to fire Plaintiff.

See Connor v. Giant Food, Inc., 187 F.Supp.2d 494, 498 (D.Md. 2002) (stating that even though the plaintiff denied threatening his manager, "he presents no evidence that Giant did not actually believe the threats had taken place"); *Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 444 (4th Cir. 1998)* (stating that "[t]he uncontested evidence establishes that Morris honestly believed that [the plaintiff] deserved to be discharged"). Although Defendant told state officials that Plaintiff was fired due to "lack of work," this inconsistency "does not necessarily establish that the plaintiff's proffered reason . . . is correct." [8] *Reeves, 530 U.S. at 146-47.* Plaintiff must assert facts to show that Defendant had a discriminatory intent. Plaintiff alleges that Defendant manufactured the threat allegations to cover up Defendant's discriminatory conduct, but cites no evidence in the record to support this assertion. Plaintiff's final point, that Defendant fired Plaintiff without interviewing him first about the allegations, does not lead to an inference of discrimination. Because Plaintiff has not provided sufficient evidence to demonstrate that Defendant's stated reason for his firing was a pretext for discrimination, the court will grant summary judgment to Defendant on Plaintiff's claim that he was fired due to his race.

2. Retaliatory Firing

Plaintiff contends that he was fired in retaliation for complaining to Ms. Peck, Mr. Kaplan, Mr. DeCesaris, and Ms. Leftrict about disparate treatment in his sales assignments. (Paper 24, at 9). Defendant responds that it fired Plaintiff because he threatened Ms. Peck. (Paper 15, at 20).

To state a *prima facie* case of retaliation, the plaintiff must show (1) the plaintiff engaged in a protected activity; (2) the employer acted adversely against the plaintiff; and (3) the protected activity was causally connected to that adverse action. *Beall v. Abbott Labs., 130 F.3d 614, 619 (4th Cir. 1997).* With respect to the third element, "the employer must have taken the adverse employment action because the plaintiff engaged in a protected activity." *Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998).* Thus, "the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of a prima facie case." *Id.* Courts also look to the length of time between the employer's awareness of the protected activity and the alleged adverse employment action. *See, e.g., Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998)* (stating that a thirteen-month lapse negated any inference of a causal connection); *Dowe, 145 F.3d at 657* (finding no retaliation where there was a three-year time lapse).

Plaintiff can show the first two prongs that he had engaged in a protected activity by complaining about disparate treatment and that Defendant took an adverse action by firing Plaintiff. Regarding the third element, the record is unclear as to whether Mr. DeCesaris knew Plaintiff had complained of racial discrimination. Defendant argues that when Plaintiff met with Mr. DeCesaris to discuss the Hamlin Park assignment, Plaintiff did not discuss the issue of race. Even if Mr. DeCesaris was not aware of Plaintiff's complaint based on this meeting, another portion of Plaintiff's testimony indicates that Mr. DeCesaris may have known. [9] Viewing this evidence in the light most

favorable to Plaintiff, the court will assume that Mr. DeCesaris was aware of Plaintiff's discrimination complaints. Plaintiff was terminated two months after he complained to Mr. Kaplan and a month and a half after his meeting with Mr. DeCesaris.

Defendant has rebutted the presumption of retaliation by stating that Plaintiff was fired because Mr. DeCesaris believed he threatened Ms. Peck's life. In response, Plaintiff asserts that he did not make any threats, and that the real reason was retaliation for his complaints. In support, Plaintiff asserts: (1) he was not fired until he complained to management; (2) nothing in the record shows that Plaintiff had been a "problem employee" or had assaulted others before Defendant fired him; and (3) Ms. Leftrict conducted her investigation into the alleged threats without Mr. DeCesaris' approval, which was against company policy.[10] (Paper 24, at 9-10).

Accepting Plaintiff's contentions as true for purposes of this motion, Plaintiff has not produced sufficient evidence to show he was discharged in retaliation for his complaint. First, Plaintiff relies on the timing of his discharge - the fact that Defendant did not fire Plaintiff until after he complained in early September about racial discrimination. This fact, taken alone, is not sufficient to show Defendant fired Plaintiff because of his complaint and not because Defendant believed he had made threats. In fact, the timing of Plaintiff's termination - about a week after Ms. Leftrict began investigating possible threats - more directly supports Defendant's position. Plaintiff also appears to argue that Defendant's reason for termination cannot be believed because there were no prior allegations of

Plaintiff making threats. However, the court will not second-guess Defendant's decision to fire Plaintiff under these circumstances. *Beall, 130 F.3d at 620* ("Without evidence of pretext for retaliation, this Court will not act as a superpersonnel department that reexamines an entity's business decisions" (internal quotation marks omitted)); *see also Tinsley, 155 F.3d at 444* ("[T]he fact that [the plaintiff] had a good track record before she worked for Morris does not establish that Morris's criticisms of [the plaintiff's] later performance were false or that the real reason for Morris firing [the plaintiff] was retaliation."). Plaintiff simply has provided no evidence that Defendant engaged in retaliatory conduct, for instance, by providing evidence that Defendant's managers harbored animus toward Plaintiff because he had complained of racial discrimination. *See Smith v. First Union Nat'l Bank, 202 F.3d 234, 249 (4th Cir. 2000)* (observing that the plaintiff "advances no evidence . . . that Hutto or anyone else at First Union harbored animus against her for complaining about Scoggins or for filing a Complaint with the EEOC"). Accordingly, Plaintiff has failed to demonstrate that Defendant's proffered reason was mere pretext for retaliation, and the court will grant summary judgment on Plaintiff's claim that he was fired in retaliation for complaining about racial discrimination.

B. Denial of Opportunity Due to Race

Plaintiff alleges that due to his race he was denied benefits that Caucasian community sales managers received, including lucrative commissions, advancement, incentives, and training. (Paper 1, at P 21). Defendant contends Plaintiff suffered no adverse

job action when it assigned Plaintiff to Hamlin Park in September 2003 and that Plaintiff's remaining claims regarding commissions, incentives, and training are statutorily time barred. (Paper 15, at 21, 25).

1. The Decision to Transfer Plaintiff to Hamlin Park

Defendant asserts that Plaintiff's assignment to Hamlin Park was not an adverse employment action. Whether the plaintiff has direct or indirect evidence of discrimination, "the existence of some adverse employment action is required." *Sterling v. Tenet, 416 F.3d 338, 345 (4th Cir. 2005)* (quoting *James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375 (4th Cir. 2004))*. The Fourth Circuit has defined an adverse employment action as "a discriminatory act which adversely affect[s] the terms, conditions, or benefits of the plaintiff's employment." *Booz-Allen, 368 F.3d at 375* (quoting *Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001)* (internal quotation marks omitted)). In *Booz-Allen,* the court addressed the issue of job reassignments in detail:

> The mere fact that a new job assignment is less appealing to the employee, however, does not constitute adverse employment action. *Gunten, 243 F.3d at 868.* A "reassignment can only form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some significant detrimental effect." *Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).* "[A]bsent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position

> commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position." *Id. at 256-57*; *see also Taylor v. Virginia Dep't of Corrs., 177 F.Supp.2d 497, 504-05 (E.D.Va. 2001).*

Id. at 376.

In *Booze-Allen*, the plaintiff was an African-American male who worked for the defendant Booze-Allen & Hamilton, Inc., as a project manager for the company's contract with the Washington Metropolitan Area Transit Authority ("WMTA"). *Booz-Allen, 368 F.3d at 372-73.* Due to conflicts with the client, the defendant reassigned the plaintiff to a job that allowed him to focus on his pre-existing marketing and business development duties, but he was no longer in a managerial role. He continued to work as a staff member on the WMTA contract. *Id. at 374.*

In order to determine whether the plaintiff had suffered a "significant detrimental effect" on his opportunities for promotion and professional development, the Fourth Circuit considered whether there was "a decrease in compensation, job title, level of responsibility, or opportunity for promotion." *Booz-Allen, 368 F.3d at 376* (quoting *Boone, 178 F.3d at 256*). The Fourth Circuit agreed with the district court that the plaintiff continued to receive the same pay, benefits, and other employment terms and conditions. The court concluded that:

> [A]n employee's dissatisfaction with this or that aspect of work does not mean an

> employer has committed an actionable adverse action. And speculation about the future adverse consequences of a reassignment may not rise to the level of a genuine dispute. Inasmuch as James departed the company before he even came up for a promotion, we are left to guesswork and conjecture as to what his prospects would have been. James' speculations about the impact of his reassignment on his opportunity for professional development are merely that - stark assertions that are not sufficient to survive summary judgment.

Id. at 377.

Here, there is no evidence that Plaintiff's income changed as a result of the assignment, or that his responsibilities, position, or title changed. Although Plaintiff questions the method Ms. Peck used for making assignments, [11] he has not directly addressed Defendant's assertion that the Hamlin Park assignment was not an adverse employment action that affected the terms, conditions or benefits of his employment. Presumably, Plaintiff believes the assignment was less favorable because selling homes at Hamlin Park would be difficult. In his deposition, Plaintiff described the community as "blighted" (paper 14, ex. 1, Holland dep., 140) and stated that the community was not ready or open, *id.* at 140-41. He also expressed concern that the starting price of the homes - $ 200,000 - was too high for the community, *id.* at 168, and he questioned the adequacy of the incentive package, *id.* at 170. Plaintiff has not, however, proffered any evidence to support these opinions. For instance, Plaintiff has provided no

information on where the neighborhood is or the type of home being sold, or provided support for his assertion that the neighborhood was priced higher than the surrounding community. Plaintiff's contention that working in Hamlin Park would have depressed his income is conjecture that is insufficient to survive summary judgment. *See Booz-Allen, 368 F.3d at 377.*

2. Time Bar

Defendant asserts that the remaining events upon which Plaintiff sues are time barred because they occurred more than 300 days before Plaintiff filed his EEOC charge. Plaintiff filed his EEOC charge on May 4, 2004. Based on Defendant's argument, events occurring before July 9, 2003, are time barred. They include: (1) incidents involving split commissions, denial of lock boxes, and efforts to raid Plaintiff's customers; (2) assignments before July 2003; (3) restrictions on lots Plaintiff could sell; (4) incidents involving sales incentives; (5) increases in home sale prices to depress Plaintiff's sales; (6) denial of a contest trip in 2001; and (7) denial of the CSP designation on his business card in 2002. (Paper 15, at 25-26). Plaintiff argues that because he was denied favorable assignments and other opportunities throughout his employment with Defendant, Plaintiff's claims are not statutorily time barred because the incidents constitute a continuing violation.

To pursue a Title VII claim, Plaintiff "must have filed a complaint with the EEOC within 180 days of the incident or within 300 days of the incident if state or local proceedings are initiated." *Beall, 130 F.3d at 620* (citing *42 U.S.C. § 2000e-5(e)(1)*). Incidents that occurred beyond these deadlines are time barred unless

they are related to a timely incident as a "'series of separate but related acts' amounting to a continuing violation." *Beall, 130 F.3d at 620* (quoting *Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980)).*

Assuming *arguendo* that each incident Plaintiff relies on is related, "the court must first conclude that there was a *present* violation." *Tinsley, 155 F.3d at 442.* In *Hill v. AT&T Techs., Inc.*, the Fourth Circuit stated that:

> [T]he "critical question" in every discrimination case, whether there is a charge of "continuing violation" or not, is "whether any present violation exists" and not "merely continuity," "present violation" being one occurring within 180 days of the filing of a charge on account of such violation with the EEOC. . . . [W]e had occasion recently to examine this continuing violation theory and we held that in order to apply this theory that there must be a "present violation" within the required time period. *Woodard v. Lehman, 717 F.2d 909, 914-15 (4th Cir. 1983).* In that case we said: "It is only where an actual violation has occurred within that requisite time period [i.e, within the period of 180 days before the filing of a charge with the EEOC] that under any possible circumstances the theory of continuing violation is sustainable."

731 F.2d 175, 180 (4th Cir. 1984) (internal citation omitted).

To assert his continuing violations theory, Plaintiff relies on several cases. *See, e.g., Sabree v. United Bhd. of Carpenters & Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990)*; *Chung v. Pomona Valley Cmty. Hosp., 667 F.2d 788 (9th Cir. 1982)*; *Jenkins v. Home Ins. Co., 635 F.2d 310 (4th Cir. 1980)*; and *Elliott v. Sperry Rand Corp., 79 F.R.D. 580 (D.Minn. 1978)*. The cases Plaintiff cites are consistent with the Fourth Circuit's position. *See Sabree, 921 F.2d at 400* ("In order for the violation to be actionable, at least one act in the series must fall within the limitations period."); *Elliott, 79 F.R.D. at 585* ("An employee may challenge a series of events, all of which are alleged to have been discriminatory, but only one of which occurred within the relevant time period." Plaintiff's own argument recognizes this rule when he states that "*although there must be a discriminatory act within the charge-filing period,* if the serial violations are adequately related, each is actionable . . . ." (Paper 24, at 16) (emphasis added).

Plaintiff's assignment to Hamlin Park is the only claim within the 300-day time limit. [12] Because Plaintiff has failed to provide sufficient evidence to withstand summary judgment on that claim, Plaintiff's remaining claims regarding denial of opportunities occurring before July 2003 are time barred. [13]

3. Denial of Opportunity Due to Pattern or Practice

Plaintiff alleges in his complaint that Defendant has an "institutionalized policy" under which Caucasian community sales managers received opportunities that he did not receive. (Paper 1, at P 21). The allegation is based on the "*system* of providing Caucasian sales managers assignments in premium locations" (emphasis in original), and the creation of programs for

communities assigned to Caucasian sales managers "to effectuate an accelerated sales pace and higher commissions, thereby deliberately depressing the earnings of the plaintiff and diminishing his sales status." (Paper 24, at 10-11).

It is unclear whether Plaintiff seeks to bring a pattern or practice claim, or whether he seeks to invoke pattern or practice to support his burden of proof under *McDonnell Douglas*. To the extent that plaintiff seeks to bring a separate claim, the Fourth Circuit has held that "individuals do not have a private, non-class cause of action for pattern or practice discrimination under *§ 1981* or Title VII." *Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 759 (4th Cir. 1998). See also Williams v. Giant Food Inc., 370 F.3d 423, 430 n.3 (4th Cir. 2004)*("*Lowery* . . . held that an individual plaintiff (as opposed to a class action plaintiff) cannot pursue a cause of action based on a pattern or practice of discrimination or invoke the proof scheme described in *International Brotherhood of Teamsters v. United States* . . . ." (internal citation omitted)). In the alternative, to the extent that Plaintiff seeks to use pattern or practice to support his burden under *McDonnell Douglas*, as discussed previously, Plaintiff's argument cannot succeed because he cannot show a present violation within the statute of limitations.

V. Motions to Strike

Defendant filed three motions to strike various papers submitted by Plaintiff: first, Defendant received a paper on or about May 25, 2005, styled Amended Answer, but no such paper was ever filed with the court. Accordingly, that motion, paper 29, is denied as moot. Second, Defendant moved in paper 30 to strike

Plaintiff's reply, which is paper 27. The court already disabled the link to paper 27, *see* entry 28, so this motion is also moot. Finally, Defendant moves in paper 34 to strike Plaintiff's response in paper 33, as an unpermitted surreply. Plaintiff opposes this motion, reciting that paper 33 is merely a legible, electronic version of earlier papers. The court has referred to paper 24 as Plaintiff's opposition to the motion for summary judgment, and has no need to refer to paper 33. Accordingly, Defendant's motion to strike paper 33 is granted.

VI. Conclusion

For the reasons stated, the court will grant Defendant's motion for summary judgment, deny Plaintiff's motion to extend the discovery deadline, deny Plaintiff's motion for leave to file an amended complaint, and deny Defendant's two of motions to strike as moot, but grant the third. A separate Order will follow.

DEBORAH K. CHASANOW

United States District Judge

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 14<th> day of February, 2006, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion of Defendant Washington Homes, Inc., for summary judgment (paper 14), BE, and the same hereby IS, GRANTED;

2. The motions of Plaintiff Dorn B. Holland for an extension of time to complete discovery (paper 16) and for leave to file an amended complaint (paper 23) BE, and the same hereby ARE, DENIED;

3. The motions of Defendant (papers 29 and 30) to strike Plaintiff's papers BE, and the same hereby ARE DENIED as moot, but the motion to strike paper 33 (paper 34) BE, and the same hereby IS, GRANTED;

4. Judgment BE, and the same hereby IS, ENTERED in favor of Washington Homes, Inc., and against Dorn Holland on all claims; and

5. The Clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties and CLOSE this case.

DEBORAH K. CHASANOW

United States District Judge

Footnotes

[1]From the testimony, it appears Plaintiff was unable to sell homes during that week.

[2]Plaintiff alleged in his complaint that after he completed the class, Ms. Peck refused to allow him to put the CSP designation on his business cards, but allowed Caucasian sales managers to do so. (Paper 1, P 11). Plaintiff has offered no evidence with respect to this allegation.

[3]On November 3, 2003, he was told that his end date was changed to November 3 so that his 401K plan would reach maturity When Defendant fired Plaintiff, he was one day short of his five-year anniversary.

[4]Although disputed facts are viewed in the light most favorable to Plaintiff, the court provides Defendant's version for purposes of analysis.

[5]Defendant did not provide the original statements in its motion for summary judgment. Instead, Defendant provided "summary statements" that were dated August 2004, after Plaintiff was fired. (Paper 14, ex. 6).

[6]On December 8, 2004, the parties stipulated that the claims against "K. Hovnanian Company" be dismissed.

[7]Even if Plaintiff's first attempt to amend his complaint on May 9, 2005, had been successful, the motion would still have been filed after the Scheduling Order's deadline.

[8]Ms. Leftrict stated in a supplemental affidavit that she decided not to enter a "gross misconduct" disqualifying entry on Plaintiff's application for unemployment compensation because of the circumstances of his termination. (Paper 22, ex. 1).

[9]Plaintiff testified that Ms. Leftrict had told him that "Ed Kaplan with Didi Peck stormed her office to get information out of her so they could strategize. She said she told Hugo DeCesaris and Didi Peck that if I was to go to any lawyer outside the company, they better handle this, because they would see this as racial discrimination." (Paper 14, ex. 1, Holland dep., 150).

[10]For the third assertion, Plaintiff relies on Defendant's Associate Manual. However, the manual does not support Plaintiff's assertion that Ms. Leftrict conducted the investigation improperly by not notifying Mr. DeCesaris. In any event, it is unclear what this assertion has to do with Plaintiff's retaliation claim.

[11]Plaintiff claims that he was told the factors Ms. Peck used included education and performance. (Paper 14, ex. 1, Holland dep., 36). At one point, Ms. Peck also told him that the first person done with a project automatically got the next project no matter what the assignment was or where it was. *Id.* at 37-38. Because Plaintiff cannot show that he suffered an adverse employment action, the question of how Ms. Peck made assignment decisions (i.e. whether the decision was based on education and performance, or whether the decision was based on who finished a project) becomes an immaterial fact.

[12]Plaintiff asserts that he has other incidents within the 300 days, including being moved to another location "with little or nothing to do" and his transfer to another location at his work site. (Paper 24, at 12). However, the court cannot determine the dates on which these events occurred because Plaintiff has neither provided dates nor provided citations to the record.

[13]In light of the foregoing, the court need not address Defendant's argument that the incidents are discrete separate events and therefore are not subject to the continuing violation theory.

Filed 7/18/07

No. 06-1309

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DORN B. HOLLAND,

Plaintiff-Appellant,

v.

WASHINGTON HOMES, INCORPORATED,

Defendant-Appellee.

On petition for Rehearing and Rehearing En Banc

Appellant filed a petition for rehearing and rehearing en banc.

Judge King voted to grant panel rehearing. Chief JudgeWilliams and Judge Duncan voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the directions of Chief Judge Williams for the Court.

Filed 7/19/07

No. 06-1309

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DORN B. HOLLAND,

Plaintiff-Appellant,

v.

WASHINGTON HOMES, INCORPORATED,

Defendant-Appellee.

Corrected Order On petition for Rehearing and Rehearing En Banc

Appellant filed a petition for rehearing and rehearing en banc.

Judge King voted to grant panel rehearing. Chief Judge Williams and Judge Duncan voted to deny.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Chief Judge Williams for the Court.